PETITION FOR WRIT OF CERTIORARI

Petitioners Alphonse Rainer, David M. Sacharnoski, Harold Hargan, Charles A. Ramsey, Mrs. H.C. (Sylvia) Mathis, Mrs. Alphonse (Janie) Rainer, Sybil Mathis, Shanda M. Mathis and Chyanne Rainer Stevens respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 402 F.3d 608 (6th Cir. 2005). The decisions of the United States District Court for the Western District of Kentucky were unreported and are appended hereto.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on March 8, 2005. Rehearing was granted and the opinion was amended on March 25, 2005. A Petition for Rehearing En Banc was denied May 27, 2005. This Court has federal question subject matter jurisdiction over the claims herein pursuant to 42 U.S.C. §2210(n)(2) and 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Fourth Amendment, Fifth Amendment, the Supremacy Clause to the United States Constitution, Art. 6 CL 2, and the Price-Anderson Act, 42 U.S.C. § 2014.

STATEMENT OF THE CASE

Ten miles west of the city of Paducah, Kentucky, is a uranium gaseous diffusion plant that was constructed in the early 1950s (hereinafter, Paducah Gaseous Diffusion Plant, or "PGDP"). Although owned by the government, since its construction through 1999, PGDP was leased and operated by private contractors. Jnion Carbide was the original operator, replaced by Martin Marietta in 1984. Martin Marietta operated the plant through its subsidiary, Martin Marietta Utilities Services until1995, when it became Lockheed Martin Utilities Services, which operated the plant until May of 1999.

PGDP was designed to receive uranium in its natural state and enrich it through a gaseous diffusion process. The enriched uranium was then transferred to other sites for further enrichment. Had PGDP only received naturally occurring uranium as intended, "transuranics", which are extremely radioactive man-made products of a nuclear reaction, should not have been present at PGDP. Unfortunately, PGDP was not operated as intended. PGDP also accepted and processed spent nuclear reactor fuel, primarily from Respondent General Electric's Hanford Nuclear Reservation in Richland, Washington. This "recycled uranium" or "reactor tails" was contaminated with transuranics including neptunium 237 and plutonium 239. Transuranics are thousands of times more lethal than naturally occurring uranium.[1] Unbeknownst to workers, PGDP's use of this material as a feed stock contaminated the

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[1] The specific radioactivity of neptunium 237 is two thousand times higher than the radioactivity of depleted uranium. Plutonium's specific radioactivity is approximately eighty nine times that of neptunium 237.

entire plant with transuranics, radioactive materials that PGDP was simply not designed to protect against.

The failure of Respondents to protect workers from radioactive exposure was confirmed by the government in October 1999, when the Department of Energy ("DOE") issued the first in a series of reports regarding the contamination at PGDP. The DOE's "Phase I Report" found that the PGDP site contained numerous previously undisclosed contaminated areas, and that worker safety programs "do not insure familiarity with workplace hazards and have not adequately addressed the presence of transuranics." (Phase I Report, Jt. App. 598[2]). According to the Phase II Report:

> As early as 1957, the site became aware of the presence of transuranic elements . . . in feed materials processed from spent reactor fuel at the Hanford and Savannah River sites. Transuranics and fission products have a much higher specific activity than uranium and resulted in much higher dose to some workers. These materials were a concern where they were concentrated. . . . ***However, the presence of these materials, the increased risks involved, and the rationale for additional controls were not shared with workers.***"

(Phase II Report, Jt. App. 654)(emphasis added).

The record below contains numerous examples of internal documentation that PGDP management was well aware of the hazards of transuranics at PGDP. (*See e.g.*,

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[2] References herein to "Jt. App." are to the parties' Joint Appendix before the United States Court of Appeals for the Sixth Circuit.

July 1959, report entitled "The Neptunium Problem at The Paducah Plant" in which it is recorded that one convertor (there were thousands at the plant) contained enough neptunium 237 to provide a maximum body burden for up to 920 men (Jt. App. 1076)).

Plant contamination continued throughout the decades. For example, a plant spill in 1990 contained enough transuranic material to expose approximately 700,000 workers to their annual exposure limit and the material remaining in the drum contained enough radioactive material to expose approximately 1.2 million workers to their annual limits. (Thorne Affidavit, Jt. App. 1084-1087). There were approximately 30,000 such drums at PGDP.

Although management knew of the hazards presented by plutonium and neptunium in the process, no special precautions were instituted at the plant because of the presence of transuranics. Workers like Alphonse Rainer, Charles Ramsey and Charles Deuschle were taught that all of the radioactive materials at PGDP were low level uranium and that the material they handled was safe enough to eat. (*See, e.g.*, Phase II report, Jt. App. 691-696, noting contaminated work stations, eating areas, clothing, failures of management to implement the most basic radiation protection and contamination control requirements.)

In document after document, it is painfully evident that the Respondents' motivation for not informing workers of the presence of transuranics was to keep costs down at the plant. As the DOE observed in the "Phase II Report":

> A March 1960 letter revealed that AEC and contractor management, including the PGDP Health Physics and Hygiene Department, were aware of the

> potential hazards presented by transuranic elements contained in the feed material the Plant received from Hanford reactor tails and the workers' lack of compliance with respiratory protection measures. The documents stated that 300 persons at Paducah "should be checked out," ***but that management was hesitant to study the issue intensively for fear that the labor union would demand hazard pay***.

(Phase II Report, Jt. App. 654-55) (emphasis added).

Blood samples obtained from Alphonse Rainer, Charles Ramsey and David Sacharnoski confirmed unequivocally that they have sustained genetic injury and are currently experiencing a disease process affecting their well-being at a subcellular level as a direct result of their exposure to plutonium and neptunium at PGDP.[3] Petitioners' experts, whose testimony was never refuted, uniformly hold that the genetic damage suffered by Petitioners resulted from exposure to ionizing radiation at PGDP and constitutes both injury and disease. Gordon K. Livingston, Ph. D. is a geneticist with over twenty five years of experience devoted to the study and research of human chromosomes in relation to genetics and diseases and the effects of genotoxic agents on human chromosomes. From 1996 to 1998 he served as a senior toxicologist in the Occupational Medicine Department at the Rocky Flat Environmental Technology site near Denver, Colorado. He has conducted investigations and

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[3] Geneticists, Gordon K. Livingston, Ph. D. and Dr. Ernst Schmid, Ph.D., performed chromosome tests on blood samples obtained from Alphonse Rainer, Charles Ramsey and David Sacharnoski in March of 2002. Harold Hargan was not tested because medical treatments he received for cancer would affect the validity of his results.

published research concerning human exposure to medical (radiotherapy), environmental (Chernobyl) and occupational (plutonium) sources of radiation. Dr. Livingston describes the injury and disease process seen in the samples obtained from Petitioners:

> [T]est results show significantly elevated rates of chromosome damage and this form of biological damage (i.e. mutations) is known to arise from double-strand breaks in DNA molecules, I conclude this finding constitutes unequivocal physical injury to the body. . . . ***[T]he DNA and chromosome damage sustained by Rainer, Ramsey and Sacharnoski has resulted in a disease process***. . . . [T]he human genome which resides within the nucleus of the cell and the DNA which resides within each of the 46 chromosomes inside the nucleus constitutes a complex genetic system which regulates all aspects of form and function for the life of the individual. The genome is a complete set of instructions or master blueprint for all cellular structures and activities throughout the life of the cell or individual. The ionizing radiation to which Rainer, Ramsey and Sacharnoski were exposed has caused significant disruption of this system by causing the loss and rearrangement of genes which are linearly arranged within the chromosomes. . . . [T]he DNA and chromosome damage was clearly caused by a "recognized etiologic agent", namely, ionizing radiation. Finally, ionizing radiation has caused a "consistent anatomical alteration" at a microscopic level involving DNA strand breakage and the structural alteration of chromosomes in Rainer, Ramsey and Sacharnoski. . . . The fact that DNA damage cannot be seen with the naked eye and must

> be visualized in the microscope does not diminish the fact that ***it constitutes a present physical injury and disease***.

(Livingston Affidavit, Jt. App. 1315-16).

Dr. Dan Sullivan, M.D., a board certified specialist in oncology and cancer research at the Moffitt Cancer Center and Research Institute, Tampa, Florida, who studies DNA damage by drugs and radiation and who clinically diagnoses and treats patients with chromosomal aberrations and mutations that have resulted in hematologic malignancies and tumors, states that chromosomal aberrations are causally associated with an increased likelihood of the occurrence of cancer because cells that have sustained such damage are known to have suffered a loss of tumor suppressor genes. (Sullivan Affidavit, Jt. App. 1402). Consequently, these injuries constitute a disease process. (Id.) Dr. Sullivan cites to a well accepted medical text - Stedman's Medical Dictionary, 24th Edition – to explain why this condition is a disease:

> **The DNA and chromosomal injuries sustained by Rainer, Ramsey and Sachronoski constitute a disease process.** Stedman's Medical Dictionary, 24th Edition, defines "Disease" as follows, "1. Morbus; illness; sickness; an interruption, cessation, or disorder of body functions, systems, or organs. 2. A disease entity characterized usually by at least two of these criteria: a recognized etiologic agent (or agents), an identifiable group of signs and symptoms; or consistent anatomical alterations." Clearly, the injuries sustained by Rainer, Ramsey and Sachronoski meet the terms of both definitions. The DNA and chromosomes are vital bodily systems

> controlling all aspects of the form and function of individuals. The DNA and chromosomal damage sustained by these three Plaintiffs unquestionably has caused "an interruption, cessation, or disorder" of this bodily system. Under definition 2, the Plaintiffs are in a diseased state (increased susceptibility to cancer) caused by a "recognized etiologic agent" (ionizing radiation) and evidenced by "consistent anatomical alterations." (DNA injury and chromosomal aberrations.)

(Sullivan Affidavit, Jt. App. 1402) (emphasis in original).

Likewise, Dr. Martin J. Raff, a board certified internal medicine and infectious disease specialist, Professor of Medicine, Division of Infectious Diseases and Associate Professor of Microbiology at the University Of Louisville School Of Medicine, states: "Disease is best defined as a disorder of physiologic function. A specific disease entity can be recognized by an etiologic entity and an identifiable group of signs and symptoms, or recognizable anatomic alterations. . . . Rainer, Ramsey and Sacharnoski are in a diseased state. . . . They have sustained a disorder of physiologic function. . . . The damage done is to the basic building block of our very bodies. They also meet the definition of having recognizable anatomic alterations (chromosomal abnormalities) caused by a recognized etiologic entity (ionizing radiation)." (Raff Affidavit, Jt. App. 1332-1333, 1336).

Although it is necessary to perform microscopic examination of the cells of Petitioners in order to diagnose their condition, this is not an unusual occurrence in medicine. For example, cancers are diagnosed by microscopic examination of cells; infections are diagnosed

by microscopic examination and counting of white blood cells. Similarly, X-rays, ultrasounds, CAT scans and MRI's have allowed physicians and scientists to identify injuries and to detect the presence of tumors, collections of fluids and gases within the body, "all or many of which are not apparent to the naked eye or physical examination." (Sullivan Affidavit, Jt. App. 1403; Livingston Affidavit, Jt. App. 1316). Furthermore, although Petitioners' bodily responses to their damaged cells are not clinically observable, they are irrefutably experiencing adverse health effects. Dr. Raff notes, "We know that ionizing effects of radiation may also induce release of cytokines (biologically active substances released from one cell which influence the behavior of other cells), thereby altering physiologic function, particularly of the immune system." (Raff Affidavit, Jt. App. 1333-4).

Relying upon a single unreported federal case from Massachusetts - Caputo v. Boston Edison Co., 1990 WL 98694 (D. Mass. 1990), the district court held as a matter of law that Kentucky would not recognize genetic and chromosomal damage as a present physical injury. The Sixth Circuit affirmed, citing "public policy" as its primary reason for agreeing that Kentucky would not recognize any injury in this case.

The trial court also held, and the Sixth Circuit agreed, that despite the reprehensible nature of the employers' conduct, their actions did not fall within the deliberate intent exception of the Kentucky Workers' Compensation Act, KRS 342.610(4). The position of the courts below is that no matter how reprehensible its actions, an employer cannot be liable under the deliberate intent exception unless the *only* motive was to inflict harm on its employees, and they erroneously equated the facts of this case (where the

employers repeatedly subjected their employees to illegal levels of radiation) to cases in which the employers merely acted in reckless disregard of possible injuries. The trial court also found Petitioners' Bivens claims and equitable claims were not cognizable against non-governmental entities under Malesko v. Correctional Services Corp, 534 U.S. 61 (2001). The Sixth Circuit affirmed the result, but found such claims preempted by Price-Anderson.

Finally, an internal Union Carbide document regarding the cover-up at PGDP that was shared with third parties was deemed protected from disclosure by the attorney/client privilege.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Opinion Conflicts with Precedent of this Court and the Kentucky Supreme Court Permitting Personal Injury Actions for Irradiation

In Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), Karen Silkwood was contaminated with plutonium over a three day period in early November, 1974. She died less than a week later in an unrelated automobile accident. The Silkwood estate successfully sued Kerr-McGee under Oklahoma common law and recovered both compensatory and punitive damages for Ms. Silkwood's plutonium contamination. The company challenged the verdict claiming that it constituted impermissible state regulation of nuclear safety preempted by the Price-Anderson Act. Upholding the verdict, this Court stated, "it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." 464 U.S. at 256.

Subsequent to this Court's Silkwood decision, Congress amended Price-Anderson in 1988 to give the federal courts jurisdiction over lawsuits for injuries arising out of "nuclear incidents." The amendment reinforces the policy recognized in Silkwood that Congress intended that state law remedies be available to those injured by nuclear incidents. This policy was abrogated by the Sixth Circuit's decision, ***based on policy considerations,*** affirming summary dismissal of Petitioner's claims. Predicting that Kentucky law would hold that physical injury and disease that is detectable at the genetic and chromosomal level is not an injury or disease as a matter of law, the Sixth Circuit precluded recovery under Price-Anderson.[4]

In contravention of this Court's and Congress' stated policy to permit recovery by those improperly exposed to radiation, the Sixth Circuit opined in this case:

> [*T*]*he most persuasive reason* to deny the plaintiffs' claims in the present case comes from public policy considerations . . . . Accepting the plaintiffs' claim would therefore throw open the possibility of litigation by any person experiencing even the most benign subcellular damage. Based upon the average American's exposure to chemically processed foods, toxic fumes, genetically modified fruits and vegetables, mercury-laden fish, and hormonally

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[4] As discussed in Section II, bodily injury, sickness, or disease is a prerequisite to recovery for personal injury under the Price Anderson Act. State law provides the substantive rules that determine a party's liability so long as the state law is consistent with the act. 42 U.S.C. §2014(hh). As discussed further below, there is no Kentucky law that precludes recovery for subcellular injury.

> treated chicken and beef, this might encompass a very large percentage of the total population.

Rainer, 402 F.3d at 621 (emphasis added). It is rare that there are answers for such "'floodgate' concerns," as this Court plainly recognized in Metro-North Commuter R. Co. v. Buckley, 521 U.S. 424, 436 (1997) ("We do not raise these questions to answer them (for we do not have the answers).") Here, however, there is a simple answer that negates such concerns. Namely, ***irradiation is a very specific type of injury that Price-Anderson recognizes as compensable***. It cannot be equated to eating hormone enhanced meats or mercury-laden fish. As stated by the Ninth Circuit:

> The case before us is different. Radiation is capable of causing a broad range of illnesses, even at the lowest doses. This has been recognized by scientific and legal authority. See In re TMI Litigation, 193 F.3d 613, 643 (3rd Cir. 1999) ("there is scientific consensus that ionizing radiation can cause cancer"); Wash. Rev.Code § 70.99.010 (2002) ("[r]adioactive wastes are highly dangerous, in that releases of radioactive materials and emissions to the environment are inimical to the health and welfare of the people of the state of Washington, and contribute to the occurrences of harmful diseases, including excessive cancer and leukemia").

In re Hanford Nuclear Reservation Litigation, 292 F.3d 1124, 1137 (9th Cir. 2002). See also, Metro-North, 521 U.S. at 435 ("cancer is both an unusually threatening and unusually frightening disease").

Because of its unique and frightening effect on the human body, this Court, the Kentucky Supreme Court and many courts faced with the question have found irradiation to be sufficient to support an action for personal injury absent clinically manifest disease. Clearly, Ms. Silkwood was not suffering a manifest clinical disease at the time of her death only days after she was irradiated; yet this Court believed her estate was entitled to a remedy for the conduct of her employer. And although Kentucky has not addressed the precise issue of whether subcellular mutations are an injury, it found compensable injury as a result of irradiation in Deutsch v. Shein, 597 S.W.2d 141 (Ky.1980). In Deutsch, Kentucky addressed the "physical contact" requirement in relation to a plaintiff who was subjected to radiation (x-rays) during her pregnancy, causing her mental anguish when she "determined there was a serious risk her fetus had been damaged." Id. at 143. The doctor argued that "an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury." Id. at 145-146. The Kentucky Supreme Court acknowledged the "contact" rule stating, "the amount of physical contact or injury that must be shown is minimal." Id. The Kentucky Supreme Court concluded as follows:

> We find no difficulty in concluding that physical contact necessary to support the claim for mental suffering occurred when, through Dr. Shein's negligence, Ms. Deutsch's person was bombarded by x-rays.

Id. at 146.

Similarly, in McCafferty v. Centerior Service Co., 983 F.Supp. 715, 720 (N.D. Ohio 1997) and Day v. NLO, 851 F.Supp. 869, 878 (S.D. Ohio 1994), the federal courts

determined that sufficiently high doses of radiation will constitute a physical impact and/or injury sufficient to bring an action for emotional distress. See also Carey v. Kerr-McGee Chemical Corp., 60 F.Supp.2d 800, 813 (N.D. Ill. 1999) (plaintiffs need only establish that they have a reasonable need for the protective measure of medical monitoring due to radioactive exposure[5]).

Thus, for the federal court below to find a "floodgates" policy consideration precludes recovery for subcellular disease caused by radiation exposure under Price-Anderson in the absence of Kentucky law requiring such a result is clear error and contravenes the purpose of the Act.

II. The Sixth Circuit's Opinion Conflicts with this Court's Precedent and Kentucky Supreme Court Precedent Defining Injury and Disease Sufficient to Support Recovery for Pain and Suffering

In Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003), this Court held that a plaintiff who has asbestosis can recover damages for fear of cancer if the alleged fear is "genuine and serious." 538 U.S. at 157. In Ayers, 538 U.S. at 141, the Court reinforced the "line drawn" between mere exposure and actual injury:

> In resolving the first issue, we follow the line drawn by [Metro-North, supra], a decision that relied on and complemented Consolidated Rail Corporation v.

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[5] At least two members of this Court would extend recovery when a plaintiff suffers a significantly increased risk of contracting a serious latent disease by reason of a toxic exposure. Metro-North, 521 U.S. at 450 (J. Ginsburg and Stevens, concurring in part and dissenting in part).

> Gottshall, 512 U.S. 532 (1994). In Metro-North, we held that emotional distress damages may not be recovered under the FELA by disease-free asbestos-exposed workers; in contrast, we observed, ***workers who "suffe[r] from a disease"*** (here, asbestosis) may "recover for related negligently caused emotional distress." 521 U.S., at 432. . . . Accordingly, we hold that mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos.

No one would suggest that Petitioners' fear of developing cancer in light of the years of radiation exposure at PGDP far in excess of federal limits is irrational, disingenuous or trivial. Moreover, Petitioners did not just show rational fear from exposure to plutonium and neptunium. They produced abundant medical evidence that they were suffering from cellular mutations medically recognized as injuries and disease as a result of their exposure.

Kentucky addressed the physical injury requirement in the asbestos case, Capital Holding v. Bailey, 873 S.W.2d 187 (Ky. 1994). In that case, the plaintiff had been exposed to asbestos dust, yet there was no evidence that the exposure had caused "any harmful change of any nature." Id. at 193. The court held:

> [U]ntil such time as the plaintiff can prove some harmful result from the exposure, albeit he need not prove he is already suffering from cancer, his cause of action has yet to accrue.

Id. at 195. Stating the rule conversely, when a plaintiff, such as Petitioners here, do prove "some harmful result from the exposure," they need not wait until cancer develops to seek recovery.

The Kentucky Supreme Court was again presented with the physical injury requirement in the context of a Fen-Phen case in Wood v. Wyeth-Ayerst Laboratories, Div. of American Home Products, 82 S.W.3d 849 (Ky. 2002). Like the plaintiff in Capital Holding, Wood did not even allege a present physical injury and presented no evidence that she had in fact sustained any physical injury. The court reiterated the rule of Capital Holding that "mere contact with toxic or harmful substances" does not give rise to a cause of action in tort and that "a plaintiff must have sustained some physical injury before a cause of action can accrue." Wood, 82 S.W.3d at 852, 854.

The Sixth Circuit recognized that the Kentucky Supreme Court was not dealing with a present physical injury in either Wood or Capital Holding, yet inexplicably relied on those cases to find that Kentucky would not countenance Petitioners' injuries. To reconcile the obvious distinguishing factor in this case (proof positive of physical injury and disease), the Sixth Circuit *presumed* the Kentucky Supreme Court was "aware that asbestos inhalation causes subclinical tissue damage to the lungs" yet refused to "recognize this damage as sufficient to constitute a 'present physical injury.'" Rainer, 402 F.3d at 619. This presumption was clearly erroneous, first, because there was no discussion of subclinical illness in either Capital Holding or Wood, and secondly, because the Kentucky Court has clearly stated that when a plaintiff proves "a harmful change" from toxic exposure, even though he may not have yet developed disease, he is permitted to proceed: "Our

present decision permits recovery for enhanced risk of cancer as well as mental distress if first the plaintiff can cross the threshold of establishing a harmful change has resulted from exposure to the potentially cancer producing agent." Capital Holding, 873 S.W.2d at 194.

Finally, to begin subdividing the *types* of physical injury or disease that support claims for emotional distress in order to limit such claims, as the Sixth Circuit did here, is to engage in exactly the type of case-by-case examination of "objective" proof of emotional distress that this Court rejected in Metro-North, supra. For example, compare the present case to the Sixth Circuit's decision in Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir. 1988)(en banc), where, in a different context the same court found cellular damage sufficient to support fear of cancer claims. In Sterling, residents living near defendant's chemical waste burial site were properly awarded damages for emotional distress as a result of contact with chemical contaminants that "invade each particular plaintiff's body, and impacted upon his or her body [b]ecause those contaminants were of such a nature as to cause the reported symptoms and cellular damage, and adverse biological change, (however slight)." Id., 855 F.2d at 1206 n. 23.

In Metro-North, 521 U.S. at 433, this Court disapproved of this kind of effort to "separate meritorious and important claims from invalid or trivial claims" by appraising the "kinds of 'objective' evidence--the confirming and disconfirming evidence" that tended to validate emotional distress. The Court observed that such evidence "seem[s] only indirectly related to the question at issue, the existence and seriousness of [the] claimed emotional distress." Id. at 433-34. The Court concluded:

> "[T]he common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories the contours of which more distantly reflect this, and other, abstract general policy concerns. ***The point of such categorization is to deny courts the authority to undertake a case-by-case examination***. The common law permits emotional distress recovery for that category of plaintiffs who suffer from a disease (or exhibit a physical symptom)[.]

Metro-North, 521 U.S. at 436 (emphasis added).

Here, Petitioners submitted abundant medical evidence that they currently suffer a physical injury and disease, albeit subcellular, from illegal radiation exposure. The Sixth Circuit's opinion carving out Petitioner's proven subcellular damage as a class of non-actionable injuries in order to prevent a flood of claims deemed trivial (the Sixth Circuit gives examples of other claims it would deem trivial, including, "the most benign subcellular damage. . . [b]ased upon the average American's exposure to chemically processed foods" Rainer, 402 F.3d at 621), is no different than the "case-by-case" approach to evaluating emotional distress claims rejected by this Court in Metro-North.

III. The Sixth Circuit's Opinion that Petitioners' Genetic and Chromosomal Injury Is Insufficient to Support a Claim Conflicts with the Second Circuit and Many District Courts Predicting States' Highest Law Which Would Find a Compensable Injury

On a national level, the law is extremely unsettled on the issue of whether cellular damage with subclinical effects

constitutes a cognizable injury. The Second Circuit rejected the argument that subclinical harm is not a true medical harm in Lead Industries Ass'n, Inc. v. Environmental Protection Agency, 647 F.2d 1130, 1158 (2nd Cir. 1980). In Lead Industries, an association of manufacturers that included lead in their product challenged the EPA's establishment of maximum levels for purposes of air quality standards. The Second Circuit rejected challenges to the evidence of negative "subclinical" health effects of lead:

> ...the clinical/subclinical distinction has little to do with the question whether a particular effect is properly viewed as adverse to health. Rather, the distinction pertains to the means through which the particular effect may be detected: observation or physical examination in the case of clinical effects, and laboratory tests in the case of subclinical effects. Thus describing a particular effect as a "subclinical" effect in no way implies that it is improper to consider it adverse to health. ...Expert medical testimony in the record confirms that the modern trend in preventive medicine is to detect health problems in their "subclinical" stages, and thereupon to take corrective action. Moreover, as we have already noted, the Center For Disease Control uses the same "subclinical" effect as the key indicator of the need for medical intervention in its lead poisoning screening program.

Lead Industries, 647 F.2d at 1158-1159. Similarly, in American Home Products Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760 (2nd Cir. 1984), where insurance companies disputed whether non-symptomatic injuries caused by exposure to various drugs manufactured by American Home

Products were "bodily injuries" under their policies, the Second Circuit opined:

> Some types of injury to the body occur prior to the appearance of any symptoms; thus, the manifestation of the injury may well occur after the injury itself... We find no basis...for a ruling that "injury in fact" means injury that is "diagnosable" or "compensable" during the policy period. . . . [C]ompensability is a legal concept that is not material to the determination of whether an injury has in fact occurred. As the district court ruled, that determination must be made according to the facts of the particular case based on medical evidence as to which drug was used and what type of injury is claimed.

American Home Products, 748 F.2d at 764-65. The issue of whether non-symptomatic injuries constitute "bodily injury" or "disease" under insurance policies has arisen often. In an unreported decision, the Ninth Circuit held that the cellular damage alleged to be caused by cell phones is a "bodily injury" for the purposes of insurance coverage. Voicestream Wireless Corp. v. Federal Ins. Co., 112 Fed.Appx. 553 (9th Cir. 2004) (unpublished opinion). See also Northern Ins. Co. of New York v. Baltimore Business Communications, Inc., 68 Fed.Appx. 414 (4th Cir. 2003) (unpublished opinion) (cellular damage from cell phone radiation is a bodily injury absent extrinsic evidence to the contrary); Chantel Assocs. v. Mt. Vernon Fire Ins. Co., 338 Md. 131, 656 A.2d 779, 884 (Md.1995) (lead exposure causing direct and indirect damage to cells, tissues, and organs constitutes "bodily injury"); Lloyd E. Mitchell, Inc. v. Md. Cas. Co., 324 Md. 44, 595 A.2d 469, 476-78 (Md.1991) (cellular-level bodily changes occurring after asbestos exposure constitutes "bodily injury").

Factual issues of the existence of an "injury" remarkably similar to the present case, were at issue in the case, Campbell v. Metropolitan Property and Cas. Ins. Co., 239 F.3d 179 (2nd Cir. 2001). There, the issue was whether expert testimony of the nature of the initial injury caused by lead paint was sufficient to trigger coverage. Plaintiff's expert "described the metabolic pathway by which lead enters a child's bloodstream, invades bone marrow, and inhibits the production of heme, *i.e.*, 'the building block of hemoglobin, which is the red substance which coats our red cells which all of us are dependent upon to provide oxygen to the tissues and also to remove waste products from the tissues.'" Campbell, 239 F.3d at 182. The Second Circuit found the medical expert testimony of lead's impact on this "building block of hemoglobin" sufficient to support the finding of "bodily injury."

The Fifth Circuit and several district courts have also found cellular and chromosomal damage sufficient to support liability for emotional injury. The Fifth Circuit in Hagerty v. L & L Marine Services, Inc., 788 F.2d 315, 316 (5th Cir. 1986), found the headaches, tingling and dizziness experienced by the plaintiff who was doused in a chemical compound containing benzene, toluene and xyolene, were manifestations of physical injuries sufficient to pursue his fear of cancer claim. As noted above, the Ohio district courts in McCafferty v. Centerior Service Co. and Day v. NLO, and the Illinois court in Carey v. Kerr-McGee Chemical Corp., supra, determined that sufficiently high doses of radiation will constitute a physical impact and/or injury. Likewise, in Brafford v. Susquehanna Corp., 586 F.Supp. 14 (D.Colo.1984), the court denied summary judgment against plaintiffs exposed to waste materials emitted by a uranium milling facility, concluding that "plaintiffs have at least raised a question of fact with respect

to whether a present injury in the form of chromosome damage was suffered by the plaintiffs as a result of their exposure to the radiation emitted from the mill tailings." In Werlein v. United States, 746 F.Supp. 887, 901 (D.Minn.1990), vacated in part, 793 F.Supp. 898 (1992), the court found that plaintiffs exposed to contaminated air and drinking water presented sufficient medical testimony that they "suffered an actual physical injury in the form of chromosomal breakage, and damage to the cardiovascular and immunal systems" causing the district court to conclude that it could not "rule as a matter of law that plaintiffs' alleged injuries are not 'real' simply because they are subcellular." See also Barth v. Firestone Tire & Rubber Co., 661 F.Supp. 193, 196 (N.D.Cal.1987) (plaintiff's allegations of injury to his immune system and increased risk of cancer satisfied burden to allege injury, notwithstanding plaintiff's failure to "allege any symptom of injury which can be clinically diagnosed at this time"); Anderson v. W.R. Grace & Co., 628 F.Supp. 1219, 1227 (D. Mass. 1986) (subcellular harm proven to exist through expert medical testimony based on objective evidence can support emotional distress claims). State courts have also found injury without manifest symptoms. See Laxton v. Orkin Exterminating Co., 639 S.W.2d 431 (Tenn.1982) (ingestion of chlordane in polluted household water supply constituted injury).

Other Circuits, including the Sixth Circuit in the case below, have issued opinions disagreeing with the view that cellular injury absent clinical effects is recognizable as an injury. See Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3rd Cir.1985) (holding "that subclinical injury resulting from exposure to [toxins] is insufficient to constitute the actual loss or damage to plaintiff's interest required to sustain a cause of action under generally

applicable principles of tort law"); Laswell v. Brown, 683 F.2d 261, 269 (8th Cir.1982) (rejecting, under Federal Tort Claims Act, "expos[ure] to an unusually high risk of disease in genetically passed cellular damage" as cognizable injury). But see Plummer v. U.S., 580 F.2d 72 (3rd Cir. 1978) (inmates who tested positive for tubercle bacillus need not show signs of tuberculosis to recover under Federal Tort Claims Act for negligent exposure to infected inmate).

As the decisions above illustrate, there is also wide discrepancy in the courts regarding whether the existence of an injury from toxic exposure is a question of law or fact. The Third Circuit concluded that with respect to asbestos-related pleural thickening, substantial medical disagreement over the classification of such a "condition" prevented the court from declaring it to be an injury as a matter of law. "This question is factual and remains within the province of the trier of fact." Howell v. Celotex Corp., 904 F.2d 5 (3rd Cir.1990).[6] See also, Werlein, supra. Clearly, the Sixth Circuit here disagreed, finding, despite Petitioners' substantial evidence of their injuries, that they had failed to show injury as a matter of law.

Petitioners' genetic mutations caused by irradiation at the PGDP are serious injuries, deserving of this Court's

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[6] Asbestos cases also illustrate the diverse positions taken by the federal circuits and state courts regarding compensable subcellular injuries. Multiple courts, including this Court and the Sixth Circuit in the decision below, acknowledge that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers. However, the courts differ widely on whether a cause of action in such cases arises upon inhalation, upon proof of pleural thickening, or upon development of asbestosis or cancer.

attention. The Sixth Circuit's refusal to recognize a disease process and physical injury that can only be identified through the use of microscopic analysis impacts thousands of individuals. Microscopic examination of cells to diagnose a health condition is not an unusual occurrence in medicine. As noted by Dr. Sullivan, "there are many medical conditions that are not observable to the naked eye. Science has developed numerous tools and diagnostic aids to identify those conditions." (Sullivan Affidavit, Jt. App. 1402-1403).

IV. THE SIXTH CIRCUIT'S OPINION THAT PRICE-ANDERSON PREEMPTS PETITIONERS' CONSTITUTIONAL CLAIMS CONFLICTS WITH THIS COURT'S PRECEDENT IN *BIVENS* AND ITS PROGENY

The Sixth Circuit, relying primarily upon Schweiker v. Chilicky, 487 U.S. 412 (1988) and Bush v. Lucas, 462 U.S. 367 (1983), decided that because Price-Anderson "regulates the ability of individuals to sue as a result of a 'nuclear incident,'" that the Act provides an "adequate remedial mechanism" for Petitioners, and thus refused to recognize a Bivens claim. Rainer, 402 F.3d at 624. However, in Carlson v. Green, 446 U.S. 14, 18 (1980), the Court established that legislation may defeat a Bivens claim only if defendants demonstrate "'special factors counseling hesitation in the absence of affirmative action by Congress' . . . [or if] Congress has provided an alternative remedy which it explicitly declared to be a ***substitute*** for recovery directly under the Constitution and viewed as equally effective." (Emphasis in original, quoting Bivens, 402 U.S. at 396 (other citations omitted)). Price-Anderson clearly does not contain an "explicit congressional declaration that persons [injured by radiation exposure] ... may not recover money damages ..., but must instead be remitted to another

remedy, equally effective in the view of Congress." Bivens, 403 U.S. at 397. Indeed, quite the opposite is true. With the exception of punitive damages, Price-Anderson expressly recognizes the entire host of legal remedies for personal injury, property damage, and so on, from radiation exposure, albeit granting the federal courts jurisdiction over these claims. 42 U.S.C. § 2210(n)(2).

Moreover, for such preemption to occur, Price-Anderson must provide "meaningful safeguards or remedies for the rights of [Petitioners]" as discussed by this Court in Chilicky and Bush. See Chilicky, 487 U.S. at 425. In Chilicky, the plaintiffs brought a Bivens action for wrongful termination of their social security disability benefits. This Court concluded that Congress had considered and addressed the problem of wrongful termination of disability benefits through the Social Security Act's elaborate remedial structure, Chilicky, 487 U.S. at 425-26, and further, that the Social Security Act's comprehensive remedial scheme was a special factor counseling hesitation to permit a Bivens action. Id. at 429. Similarly, the plaintiff in Bush could not justify the creation of a new legal remedy under Bivens against supervisors who violated his First Amendment rights in light of the comprehensive nature of the remedies available before the Civil Service Commission. Bush, 462 U.S. at 388.

Price-Anderson is uniquely characterized by the absence of any "special factors counseling hesitation in the absence of affirmative action by Congress," Bivens at 396, and virtually no discussion of the mechanism of seeking recourse for personal injury beyond a general right to sue in federal court. "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, courts may use any available remedy to make good

the wrong done." Bivens at id. (internal quotations and citation omitted). Accordingly, there are "no special factors counseling hesitation in the absence of affirmative action by Congress." Id. Congress clearly intended that individuals adversely impacted by radiation exposure have some remedy. "[N]o congressional determination foreclose[es] the damages" and Price-Anderson is not declared "to be a substitute for a Bivens action." Bush, 462 U.S. at 377-78.

If this Petition is granted, and the Court agrees Price-Anderson does not preempt Petitioners' Bivens claims, then the Court will also be asked to address the viability of Bivens claims against corporate agents of the federal government and the availability of equitable remedies such as disgorgement of profits from the Respondents' illegal activities, as well as the denial of the Petitioners' motion to amend their Bivens claims. As discussed above, Respondents' unconstitutional conduct which included hiding workers' exposure to avoid hazard pay and failing to implement required safety measures at PGDP, was motivated by a desire for profit. Disgorgement of the financial benefit realized from this conduct is an appropriate remedy and is within the federal courts' equity authority. In circumstances arising from constitutional violations, the Supreme Court has long held that district courts have broad authority to fashion equitable remedies. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15-16 (1971). See also U.S. v. Universal Management Services, Inc., Corp., 191 F.3d 750, 760-761 (6th Cir. 1999) (court's equitable authority includes the power to order disgorgement of profits). In U.S. v. 1461 West 42nd Street, Hialeah, Fla., 251 F.3d 1329, 1334-1335 (11th Cir. 2001), the Eleventh Circuit addressed the remedies available for the federal government's improper seizure of real property in "violation of the Fifth Amendment Due Process Clause." The court

noted that "the return of any rents received or other proceeds realized from the property during the period of illegal seizure" was the appropriate remedy and was not barred by sovereign immunity. Id. at 1337-1338. If courts readily impose disgorgement against actual federal agencies, no rationale can support the argument that non-governmental actors are somehow above this remedy.

IV. THE SIXTH CIRCUIT ERRED IN ITS APPLICATION OF KENTUCKY LAW REGARDING EMPLOYER LIABILITY FOR INTENTIONAL TORTS

The Sixth Circuit adopted an extremely narrow interpretation of the phrase, "deliberate intent" and refused to apply the Kentucky's Workers' Compensation exception to the employers' conduct in this case. KRS 342.610(4) preserves a cause of action when "injury or death results to an employee through the deliberate intention of his employer to produce such injury or death." In each of the Kentucky cases cited by the Sixth Circuit to deny Petitioners' action, the protected employers were aware of "the ***possible*** consequences" of their unsafe practices. Moore v. Environmental Const. Corp., 147 S.W.3d 13, 18 (Ky. 2004) (unsafe trenching practices caused plaintiff's death) (emphasis added). See also McCray v. Davis H. Elliott Co., 419 S.W.2d 542 (Ky.1967) (employee electrocuted while working on a tall, dangerous electrical pole); Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25 (Ky.1955)(employee injured by unsafe machine press). Each of these cases illustrate the application of the Kentucky rule that a "defendant who acts in the belief or consciousness that the act is causing ***an appreciable risk*** of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is

not an intentional wrong." Moore, 147 S.W.3d at 17-18 (emphasis added; internal quotation omitted).

None of these Kentucky cases can be compared to the knowing injuries repeatedly inflicted upon the workers at the PGDP. The workers at PGDP were not being exposed to an "appreciable risk of harm," but a known harm. The employers here were not just aware of "possible consequences," but knew workers and their families were being exposed daily to illegal levels of radiation. These employers hid known radioactive contamination from their workers, convinced workers the materials they handled were safe enough to eat and continued calling them to work in highly radioactive conditions with no protection. In 1960, Dr. Bruner of the AEC reported to Union Carbide that neptunium was in the reclaimed Hanford materials and suggested PGDP workers be checked for neptunium exposure, but Union Carbide refused for fear the union would demand hazard pay. (Bruner memo, Jt. App. 1074). 1961, Dr. Baker, the head of Health Physics for Union Carbide, collected urine specimens from 21 men known to have been exposed to neptunium 237 contaminated dust. Dr. Baker reported that the urinalyses performed could properly be interpreted to "indicate that 15 out of the 21 men . . . could have more than one half the permissible body burden of neptunium...." In fact, based on Baker's own tabulation, the numbers show that seven of the men had body burdens exceeding the permissible body burden. Nonetheless, this method of analysis of neptunium was abandoned because it was felt to be "tedious and expensive." ("Neptunium 237 Contamination Control and Evaluation of Employee Exposure" Jt. App. 1124-1126).

None of the workers were ever advised of these findings. Baker was denied his request to make his findings public.

Clyde Hopkins, the plant manager from 1972 to 1978, testified that he was aware that plutonium and neptunium were present at PGDP, and that they contaminated the reactor tails processed through the cascade. He testified, "we had convinced all of our employees that their health and safety was the number one issue in our company." (Hopkins deposition, Jt. App. 2105). In fact, Mr. Hopkins boasted the workers trusted Union Carbide and Martin Marietta to protect them. (Id., Jt. App. 2106).

Air samples taken throughout the course of PGDP's operation confirm extremely high levels of neptunium and plutonium within the plant. Air samples taken in the first quarter of 1962 showed airborne contamination of neptunium up to 100 times the PGDP maximum permissible concentration in air for neptunium. Health physics reports in 1980 indicated that the plant guidelines for airborne alpha activity were exceeded for uranium by a factor of 1,680, neptunium 237 by a factor of 2,121 and plutonium 239 by a factor of 2,483. (Phase II Report, Jt. App. 690-691).

None of the Kentucky cases relied upon by the Sixth Circuit come close to the deliberate actions of these PGDP employers and the Sixth Circuit's refusal to discern the difference is a misapplication of Kentucky precedent.

V. THE SIXTH CIRCUIT ERRONEOUSLY APPLIED THE ATTORNEY-CLIENT PRIVILEGE

When Union Carbide employee, R.C. Baker, prepared his scientific paper entitled, "Neptunium-237 Contamination Control and Evaluation of Employee Exposure" (Jt. App. 2489) in 1964, he wanted to present the paper at the 10th Annual Bio-Assay and Analytical Chemistry meeting in Cincinnati, Ohio, October 1964, but was denied permission

by Union Carbide, who claims the advice of counsel. Petitioners submitted proof that the purpose of the denial was to further concealment of the hazardous conditions at PGDP and to prevent workers and others from questioning Union Carbide's procedures. "'[T]here is no privilege if the communication was made to enable anyone to commit a crime or fraud.'" U.S. v. Zolin, 491 U.S. 554, 566 (1989) (quoting C. Wright & K. Graham, Federal Practice & Procedure: Evidence § 5055, p. 276 (1977)). This crime-fraud exception to the privilege applies to the documents at issue here. Furthermore, if any privilege ever attached, it was lost when the subject matter of the documents including the unfavorable impact on Union Carbide was shared with a representative of the Atomic Energy Commission, and certainly when the documents themselves were passed on to successors, and ultimately found in the custody and control of the United States Enrichment Corporation and Bechtel Jacobs Corporation, LLC.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-6032

[May 27, 2005, Filed]

ALPHONSE RAINER, ET AL., Plaintiffs-Appellants,	)
v.	)
UNION CARBIDE CORP., ET AL., Defendants-Appellees.	)

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and RICE,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Walter H. Rice, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 03-6032

[Filed, March 25, 2005]

ALPHONSE RAINER, ET AL., Plaintiffs-Appellants,	)
v.	)
UNION CARBIDE CORP., ET AL., Defendants-Appellees.	)

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and RICE, District Judge*

ORDER

Upon consideration of the petition for rehearing filed by the appellees,

* Hon. Walter H. Rice, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

It is **ORDERED** that the petition for rehearing be, and it hereby is, **GRANTED** and this court's opinion is hereby amended to read as follows:

> Although the Department of Energy (DOE) retains full ownership of the Plant, the PGDP has been managed since its construction by three successive operators, all who have been named as Defendants in this suit.

ENTERED BY ORDER OF THE COURT

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03-6032

[Filed, March 8, 2005]

ALPHONSE RAINER et al.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
UNION CARBIDE	)
CORPORATION et al.,	)
Defendants-Appellees.	)
	)

OPINION

RONALD LEE GILMAN, Circuit Judge. Workers at a uranium-enrichment plant near Paducah, Kentucky were exposed over many years to dangerous radioactive substances without their knowledge. Although not yet suffering from any symptoms of a clinical disease, four such workers and members of their families have sued General Electric (GE), the supplier of the spent uranium fuel to the plant, and the plant's three successive operators (the defendant-operators) on various state and federal grounds. In a series of orders, the district court rejected all of the plaintiffs' claims on the basis that no present harm has been shown and that the Kentucky

Workers' Compensation Act provides the exclusive remedy for the former workers. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

The Paducah Gas Diffusion Plant (PDGP) is a sprawling industrial plant located on a 3,425-acre tract of land in western Kentucky. It was built by the federal government in the early 1950s as part of an initial foray into uranium processing. Although the Department of Energy (DOE) retains full ownership of the plant, the PGDP has been managed since its construction by three successive operators all who have all been named as defendants in this suit. They are Union Carbide (formerly known as Carbide and Chemicals Company, 1950-1984), Martin Marietta (and its subsidiary Martin Marietta Utilities Services, 1984-1995), and Lockheed Martin Utilities Services (1995 to the present). Approximately 1,800 individuals have been employed by the PGDP at any one time.

The primary purpose of the PGDP is and always has been to enrich uranium. Unprocessed uranium, a naturally occurring element, arrives at the PGDP in solid form. The solid uranium is then converted into a gaseous form and forced through a series of membranes that increase the concentration of uranium-235, an isotope of the element, from approximately 0.7 percent to 2 percent. This "enriched" uranium is then shipped both domestically and overseas for use in commercial nuclear reactors and in military applications. The PGDP has, since 1952, processed over one million tons of uranium in this manner. Although enriched

uranium is not a highly radioactive material, it is known to be toxic, both chemically and radiologically, if ingested.

In addition to enriching unprocessed uranium, the PGDP has intermittently reprocessed spent uranium that has been removed from nuclear reactors. Much of this spent uranium was first processed by GE, as the operator of the Hanford Nuclear Reservation in Richland, Washington, from reactor fuel rods. The Hanford Nuclear Reservation would in turn send the uranium, by this time in the form of an ash-like powder, to the PGDP for further enrichment through its normal gas-diffusion process. Between 1953-64 and 1969-74, the PGDP processed over 100,000 tons of used uranium fuel in this manner.

Spent uranium is known to include two unwanted by products: neptunium-237 and plutonium-239. Both are highly radioactive, with long half-lives. Specifically, neptunium-237 is 2,000 times more radioactive than unprocessed uranium and has a half-life of 2.14 million years. Plutonium-239 is even more dangerous, being 89 times as radioactive as neptunium-237, with a half-life of 24,065 years. Elements such as neptunium-237 and plutonium-239 do not exist in nature and are known in the scientific community as "transuranics."

As a consequence of receiving and processing spent uranium, the PGDP became contaminated with these toxic transuranics. Tests conducted by the DOE and other organizations confirmed the existence of neptunium and plutonium at the PGDP as early as 1959, only a few years after the plant's opening. Monthly tests of air quality and annual or biannual reports provided further evidence that dangerous quantities of these substances were present at the PGDP. Recent reports have concluded that approximately

18.4 kilograms of neptunium-237 and 330 grams of plutonium-239 were received at the PGDP. Both quantities are well beyond the amount considered safe for a plant the size of the PGDP.

The rank-and-file PGDP employees were apparently kept ignorant about the presence of transuranics at the plant. One manager testified during a deposition that, despite his ten-year tenure, he could not recall whether workers were ever informed about the presence of either neptunium or plutonium. Company documents also reveal a disregard for worker safety. A 1960 memo written by a medical researcher, for example, noted that management hesitated to have approximately 300 workers examined because of the "union's use of this as an excuse for hazard pay." The same researcher noted that he had "watched one man push up his mask and smoke a cigarette using potentially contaminated hands and gloves." Another memo commented that analyzing neptunium exposure through urine samples would be too "tedious and expensive." Workers were not required to wash their hands and, into the late 1970s, not required to use respirators.

Neither party disputes that transuranics are extremely toxic. Once ingested or inhaled, they quickly settle in the bones and liver, posing a risk as they decay. Dr. Gordon K. Livingston, a genetics expert for the plaintiffs, submitted that

> when energy associated with ionizing radiation is transferred to atoms and molecules in human tissue, the molecular structure and function of the tissue is disrupted in a manner which is related to the dose or amount of energy absorbed. . . . Laboratory studies on animals and human populations exposed to ionizing radiation have shown that it induces cancer. Some population groups where this relationship has been

> conclusively demonstrated includes radium-dial painters (bone cancer), uranium miners (lung cancer), early medical radiation workers (various malignancies), atomic bomb survivors (leukemia and carcinomas) and individuals exposed to fallout radiation as a result of the nuclear reactor accident at Chernobyl (thyroid cancer).

Despite the fact that these transuranics are dangerous carcinogens, however, the plaintiffs have yet to display any salient clinical symptoms. Plaintiff Shanda Mathis, for example, was asked:

> Q. When was the last time you had a physical?
> A. A full physical, July of 2000 through a program with our job. You know, cholesterol, blood, diabetes, all that.
> Q. Did your physical reveal any problems of any kind?
> A. None, none.

Another plaintiff, Sybil Mathis, was asked whether a doctor had ever told her that she should be "concerned" about her health because her father worked at the PGDP. She replied that "no, I don't know what they have had a reason to. Like I said, I'm in seemingly good health. I go for a regular checkup once a year, and I don't--I don't know that a doctor has had a reason to tell me." Similarly, plaintiff Janie Rainer testified that she had "no present bodily injury." And Charles Ramsey, one of the lead plaintiffs in the case, testified that his main fear was not present injury, but that he was "worried to death what [the radiation] is doing to me. This is [not] something [that will] give you cancer today or tomorrow; this is something [that will give you cancer] 10, 20 years from now."

The plaintiffs nevertheless assert that they have suffered certain subcellular damage to their DNA and chromosomes. As proof, they point to the testimony of several experts. Dr. Livingston, for example, stated in his affidavit that he, along with Dr. Ernst Schmid, performed chromosome tests on blood samples provided by Alphonse Rainer, Charles Ramsey, and David Sacharnoski, three of the lead plaintiffs in this case. (Apparently not all the plaintiffs have been tested. For the purposes of summary judgment, however, we will assume that all of the plaintiffs have similar subcellular damage.) The tests revealed "various structural chromosome abnormalities" within some of the cells. Dr. Livingston stated in an affidavit that "the 8% of [plaintiffs'] cells which showed various structural chromosome abnormalities can be compared to an average of 1.3% recently reported in the scientific literature." In his opinion, "the high frequency of structural chromosome alternations . . . was caused by exposure to ionizing radiation in excess of acceptable radiation protection standards."

Other experts testified that this exposure constitutes irreversible harm and damage to the body. Dr. Livingston concluded that "the physical injuries sustained by the DNA and the misrepair of those DNA strands is analogous to a knife wound of the skin dividing the cells of the body and the scar tissue that is generated as the body attempts to repair that cellular damage." Dr. Martin Raff, another expert, drew the analogy to HIV, noting that "patients who test positive for the HIV virus may not have any signs or symptoms of clinical disease for many years . . . . But even though a person with HIV does not have 'clinical disease' they are clearly in a diseased state." He also explained that "radiation damage to chromosomes is the quintessential determinant of altered physiologic function because our chromosomes control each and every bodily function . . . . As such this premorbid state is disease." Dr. Daniel M. Sullivan stated in his affidavit that

"the physical injuries sustained by the DNA [of the plaintiffs] and the misrepair of those DNA strands is analogous to a cutting wound of the tissue of the body. . . . The primary difference is that DNA injury and chromosome misrepair have much more ominous consequences for the individual since such an injury is associated with an increased likelihood of the occurrence of cancer."

B. Procedural background

The plaintiffs are divided into four classes. Class I is comprised of current and former PGDP employees who assert claims against all of the defendant-operators. Those in Class II consists of employees who worked at PGDP between 1984 and 1988 who were never employed by Union Carbide, but are suing the company on the basis of its "radioactive legacy." Class III consists of those employees who worked at the plant between 1952 and 1998 and who assert claims against GE because it supplied the PGDP with spent uranium containing the transuranics. Finally, Class IV consists of the family members of the plaintiffs in the first three classes.

The plaintiffs commenced suit in September of 1999. In an order dated March 30, 2001, the district court dismissed the claims brought by the Class I plaintiffs, concluding that the Kentucky Workers' Compensation Act provided the exclusive remedy for claims brought by employees against their employers. A year later, in orders filed on March 15, 2002 and May 15, 2002, the court dismissed the *Bivens* claims (based upon the case of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)) brought by the remaining plaintiffs, relying upon the Supreme Court's decision in Correctional Services Corp. v. Malesko, 534 U.S. 61, 151 L. Ed. 2d 456, 122 S. Ct. 515 (2001). In a

memorandum opinion filed on July 11, 2003, the district court concluded that the Price-Anderson Act, 42 U.S.C. § 2011, preempted the plaintiffs' state-law claims. The court further concluded that, in light of the Kentucky Supreme Court's opinion in Wood v. Wyeth-Ayerst Laboratories, 82 S.W.3d 849 (Ky. 2002), the plaintiffs' evidence of subcellular damage was insufficient to be considered "bodily injury" under the Price-Anderson Act. A final judgment was ultimately entered on July 28, 2003, dismissing all of the plaintiffs' claims with prejudice. This appeal followed.

II. ANALYSIS

A. Standard of review

We review the district court's grant of summary judgment de novo. Therma-Scan, Inc. v. Thermoscan, Inc., 295 F.3d 623, 629 (6th Cir. 2002). Summary judgment is proper where there exists no genuine issue of material fact and one party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1996). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

B. Claims brought by the Class I plaintiffs

The defendant-operators submit that all of the claims brought by the Class I plaintiffs are barred by the Kentucky

Workers' Compensation Act. Ky. Rev. Stat. Ann. § 342 (2004). This Act, they argue, provides the exclusive remedy for on-the-job injuries. The relevant provision of the Act states as follows:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

Ky. Rev. Stat. Ann. § 342.690(1) (2004).

The plaintiffs acknowledge the normal exclusivity of the Kentucky Workers' Compensation Act, but contend that their claim falls under one of the Act's main exceptions, which reserves a cause of action to a worker who is injured "through the deliberate intention of his employer to produce such injury or death." Ky. Rev. Stat. Ann. § 342.610(4) (2004). In so arguing, the plaintiffs assert that the phrase "deliberate intention" must "include conduct undertaken with the knowledge that it will produce a certain result, or is substantially certain to do so." They claim that a narrower interpretation "would mean that a landscaping employer who ordered his workers to mow grass and plant trees in a garden filled with land mines . . . would not be liable under the common law due to the exclusive remedy provisions of the Kentucky Workers' Compensation Act."

We do not find the plaintiffs' hypothetical to be analogous to the facts before us, nor is their position supported by Kentucky law. In Fryman v. Electric Steam Radiator Corp.,

277 S.W.2d 25 (Ky. 1955), the first case to directly address the specific meaning of Ky. Rev. Stat. Ann. § 342.610(4)'s "deliberate intention" language, the Kentucky Supreme Court considered the case of a employee injured while operating a defective metal press. The court dismissed the worker's claims, concluding that the employer had not possessed the "deliberate intention" to injure as required by Ky. Rev. Stat. Ann. § 342.610(4), and noting that "the phrase 'deliberate intention' implies that the employer must have determined to injure the employee." *Id.* at 26. As the court observed,

> many states have workmen's compensation statutes very similar to ours and contain the exception identical to ours; namely, that liability at law exists where the injuries result through the deliberate intention of the employer. Most of the cases, if not all, from the other jurisdictions have interpreted the meaning of the phrase "deliberate intention" to be that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent.

Id. at 27.

This narrow reading of "deliberate intention" has been adopted by subsequent Kentucky cases addressing the question. In McCray v. Davis H. Elliott Co., 419 S.W.2d 542 (Ky. 1967), for example, the estate of a deceased worker claimed that the employer had demonstrated a "deliberate intention" to injure the worker by forcing him to work on a tall, dangerous electrical pole on which he was electrocuted. The Kentucky Supreme Court rejected the estate's claim, citing Fryman in declining the invitation to "to equate wanton and gross negligence with 'deliberate intention' as used in KRS [§ 342.610(4)]." *Id.* at 543.

A similar conclusion was reached by the Kentucky Supreme Court in the recent case of Moore v. Environmental Constr. Corp., 147 S.W.3d 13 (Ky. 2004). In that case, a worker was killed when a trench collapsed on him. His estate alleged that the employer's conduct was within the "deliberate intention" exception to the Kentucky Workers' Compensation Act. Rejecting the estate's claims, the court observed that "'deliberate intention' [has been interpreted to mean] that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be specific intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is *not an intentional wrong*." *Id.* at 16-17 (emphasis added) (quotation marks omitted).

At the federal level, this court addressed the same Kentucky-law question in Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527 (6th Cir. 1999). In that case, a worker at a food-packing factory was killed when a washing machine exploded. The court rejected the application of the "deliberate intention" exception, noting that

> in light of the Kentucky Supreme Court precedent interpreting the phrase "deliberate intention," we conclude that the plaintiff did not present evidence to the district court from which a reasonable jury could conclude that Alusuisse deliberately intended to cause [the plaintiff's] death . . . . Even if [the employer's] actions were reckless or wanton, which may be a fair characterization, there is no indication or reasonable inference that the company intended to injure or kill [the plaintiff].

Id. at 536 (emphasis added). This same narrow standard was also followed by the district court in Blanton v. Cooper Indus., 99 F. Supp. 2d 797 (E.D. Ky. 2000), in which workers at a chemical plant claimed that they developed cancer because of contamination at the plant. The court entered summary judgment in favor of the defendants, citing *Fryman* and *McCray* and noting that "the plaintiff in this case has not alleged or produced any evidence that the defendants either determined to injure the employees or had any specific intent to this end." *Id.* at 805.

The plaintiffs nonetheless point to a number of cases from other jurisdictions and to secondary authorities that support the proposition that "deliberate intention" may also include instances where the employer acts with the knowledge that harm might follow. But even if this is the appropriate standard in other jurisdictions and in other fields of law, this is not the Kentucky Supreme Court's interpretation of the Kentucky Workers' Compensation Act. As the district court noted in its lengthy and persuasive assessment, "the definition of 'deliberate intention to produce injury' as used in the [Kentucky Workers' Compensation Act] is much narrower than 'intent' in general tort law, where the substantial certainty analysis is proper. And . . . although a few states have either legislatively or judicially adopted the substantial certainty standard for their intent-based exclusivity exception, none had their genesis in a federal court."

In sum, Kentucky caselaw is dispositive of the claims brought by the Class I plaintiffs. Cases like Fryman have established that the "deliberate intention" exception to the Kentucky Workers' Compensation Act is viable only when the employer has "determined to injure an employee and used some means appropriate to that end, and there must be a specific intent." Fryman, 277 S.W.2d at 27. Because no proof

has been presented in this case to demonstrate that the defendants possessed the specific intention to injure the PGDP employees, the district court did not err in dismissing the claims of the Class I plaintiffs.

C. Waiver of claims under the under the Price-Anderson Act

In addressing the claims of the plaintiffs in Classes II-IV (i.e., the claims brought by plaintiffs against defendants who were not their immediate employers), the district court noted the applicability of the Price-Anderson Act, 42 U.S.C. §§ 2011. This Act was originally passed in 1957 as a provision limiting the legal liability of owners, operators, and suppliers of nuclear plants, and mandating that they purchase a specified amount of liability insurance. Thirty years later, however, "Congress enacted the Price-Anderson Amendments Act of 1988, creating a federal cause of action for 'public liability actions' arising from nuclear incidents. The federal courts were granted jurisdiction over these actions, and actions filed in state court were subject to removal. The amendment was not intended to alter the state law nature of the underlying tort claims." Day v. NLO, Inc., 3 F.3d 153, 154 n.1 (6th Cir. 1993).

As the district court noted, this court has interpreted the Price-Anderson Act as preempting otherwise applicable state-law causes of action. In Nieman v. NLO, Inc., 108 F.3d 1546 (6th Cir.1997), this court considered the claims of a plaintiff who lived near a nuclear facility. In addition to claims under the Price-Anderson Act, the plaintiff raised arguments under various state common-law theories of trespass. The Nieman court rejected these arguments, concluding that

> the Price-Anderson Act preempts [the plaintiff's] state law claims; the state law claims cannot stand as separate causes of action. [The plaintiff] can sue under the Price-Anderson Act, as amended, or not at all. His federal claim will be derived from state law, as mandated by § 2014(hh), to the extent it is not inconsistent with federal law.

Id. at 1553. The district court below therefore properly dismissed the plaintiffs' state-law claims.

No appeal was taken by the plaintiffs in the present case regarding the district court's ruling that the Price-Anderson Act preempts any separate causes of action under state law. As a result, the defendants argue that "since plaintiffs have not challenged the district court's interpretation of federal law, the district court's holding that they failed to present sufficient evidence to withstand summary judgment under the Price-Anderson Act must be deemed correct." In sum, the defendants request that all of the plaintiffs' claims be dismissed on procedural grounds.

The problem with this argument is that it ignores the boundaries established by Congress when it enacted the Price-Anderson Act. As this court has noted, the amendments to the Act "were not intended to alter the state law nature of the underlying tort claims. [The Act] provides that 'the substantive rules for decision in such action shall be derived from the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section." *Day*, 3 F.3d at 154 n.1 (citations omitted); see also Heinrich ex rel. Heinrich v. Sweet, 62 F. Supp. 2d 282, 296-97 (D. Mass. 1999) ("The [Price-Anderson] Act incorporates state law as the substantive rule of decision to govern the federal cause of action, so long as the state law is not inconsistent

with the purposes of the Act.") Thus, the Act specifically calls for state law to provide the substantive foundations for a Price-Anderson claim.

The plaintiffs in the present case necessarily had to argue on the basis of Kentucky law in order to demonstrate the legitimacy of their "bodily injury" claim under the Price-Anderson Act. Because the true underlying conflict was based upon the district court's interpretation of Kentucky law, the plaintiffs appropriately tailored their brief to address that concern. The fact that the words "Price-Anderson Act" go unmentioned in the plaintiffs' brief is, moreover, inconclusive as to whether they intended to waive their argument that the district court's interpretation of the Act was incorrect. To the contrary, we interpret their failure to mention the Act is essentially a concession by the plaintiffs that the Price-Anderson Act governs their claims. Indeed, the plaintiffs admit that "if the trial court's interpretation of Kentucky law stands[,] . . . no state tort law claims would be available directly against the Appellees." To mention the Price-Anderson Act by name would have added nothing to the substance of their arguments, which, as noted, necessarily had to rely on substantive Kentucky law. We therefore decline the defendants' invitation to dismiss all of the plaintiffs' claims under the Price-Anderson Act solely because of the latters' failure to mention the Act in their brief.

D. "Bodily injury" under the Price-Anderson Act

After dismissing the claims of the Class I plaintiffs on the basis of the Kentucky Workers' Compensation Act, the district court subsequently dismissed the claims of the remaining plaintiffs by finding that they had failed to meet the Price-Anderson Act's "bodily injury" requirement. The plaintiffs argue on appeal that the district court erred in not

recognizing that subcellular damage is a real, concrete bodily injury.

As noted above, the Price-Anderson Act creates a private right of action for claims arising out of "nuclear incidents." A "nuclear incident" is defined as "any occurrence . . . causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property . . . arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). Courts are required to look to state law for the substantive rules to apply in deciding claims brought under the Act. Day, 3 F.3d at 154 n.1.

The key question before us, then, is whether Kentucky caselaw equates "subcellular damage" with "bodily injury." This issue has been previously addressed by the Kentucky courts, but, as the plaintiffs note, the underlying facts have been slightly different. We must therefore make the "best prediction, even in the absence of direct state court precedent, of what the Kentucky Supreme Court would do if it were confronted with this question." Welsh v. United States, 844 F.2d 1239, 1245 (6th Cir. 1988). To this end, we "may rely upon analogous cases and relevant dicta in the decisional law of the State's highest court, opinions of the State's intermediate appellate courts to the extent that they are persuasive indicia of State Supreme Court direction, and persuasive opinions from other jurisdictions, including the 'majority rule.'" Id.

The Kentucky Supreme Court spoke most recently on the relevance of an undetectable physical injury in Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002). In that case, the plaintiff sued the makers of the appetite-suppressing diet

drug fenfluramine, contending that her injury consisted of "'significantly increased risk of serious injury and disease.' She further claimed that she and others [would] 'probably . . . be required to pay sums to ascertain the existence, nature and extent of their injuries in the future.'" Id. at 851. In rejecting her claim, the court noted that it "has consistently held that a cause of action in tort requires a *present physical injury* to the plaintiff," even in those cases "based on exposure to toxic or otherwise harmful substances." Id. at 852 (emphasis added). The *Wood* court concluded that "taken together, [Kentucky cases] lead to the conclusion that a plaintiff must have sustained some physical injury before a cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." Id. at 854.

A similar conclusion was reached by the Kentucky Supreme Court in Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994). In that case, a worker and his wife brought an action against a building owner due to asbestos exposure. They claimed mental and emotional suffering and the increased risk of future harm. In dismissing the claims, the court noted that "with a substance capable of causing cancer, just as with any other defective product, no cause of action accrues until the potentially harmful exposure actually causes injury that produces loss or damage." Id. at 192 (quotation marks omitted). Thus, "the mere ingestion of a toxic substance does not constitute sufficient physical harm upon which to base a claim for damages. We make no distinction between damages for 'fear of' cancer and damages for enhanced risk of developing the dreaded disease in the future." Id. at 195. Kentucky cases are therefore clear in holding that a claim of an enhanced risk of illness or disease is insufficient to establish a "present physical injury."

The plaintiffs are quick to note that Wood and Capital *Holding* are distinguishable in that those plaintiffs did not (and perhaps could not) point to any concrete physical damage. Instead, their claims were based upon the theory that their exposure might lead to an increased risk of disease. Here, in contrast, the plaintiffs argue that "appellants have much more than 'potential' consequences from 'the mere ingestion' or exposure to a toxic substance. There is ample proof of a physical/bodily injury and disease from their exposure to plutonium and neptunium. Their injuries are not speculative."

The plaintiffs correctly point out that their counterparts in Wood and Capital Holding did not claim a physical injury. Nonetheless, the inhalation of asbestos--the toxic substance at issue in *Capital Holding*--does in fact cause recognized subclinical changes. See, e.g., Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1218 (6th Cir. 1980) ("Injury, in the sense that there is tissue damage, occurs shortly after the initial inhalation of asbestos fibers."); Buckley v. Metro-North Commuter R.R., 79 F.3d 1337, 1343 (2d Cir. 1996) ("When inhaled. . . asbestos fibers become imbedded in lung tissue and . . . cause subclinical changes to occur."). So even though the plaintiffs in Capital Holding did not mention these subclinical changes in their complaint, the Kentucky Supreme Court was presumably aware that asbestos inhalation causes subclinical tissue damage to the lungs. Yet it did not recognize this damage as sufficient to constitute a "present physical injury."

Wood and Capital Holding, moreover, highlight the public policy considerations made by the Kentucky Supreme Court that are directly relevant to the case before us. In Wood, for example, the court considered, and rejected, the plaintiffs' claim for "medical monitoring," and for damages for years of periodic hospital visits and medical tests to determine whether

disease might be at an onset. 82 S.W.3d at 856. The court noted that "another shortcoming of medical monitoring is that. . . it is simply too far-reaching," Id. at 857, and cited a recent study which concluded that "given that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless." Id. at 857-58 (citations omitted). These are the same public policy considerations implicated by the plaintiffs' claims in the present case.

Wood and Capital Holding also make the important observation that a cause of action does not develop until actual harm is realized. *Wood*, for example, noted that in Kentucky a "plaintiff may bring only one claim for a given cause of action." Id. at 858. In light of this limitation, it reasoned that "those who have ingested fenfluramine, but in whom no disease is yet manifest, will be forced to either forego medical evaluations or proceed with them at their own cost. Nevertheless, any other outcome would result in inordinate burdens for both the potential victim and the alleged negligent party." Id. at 859. It concluded that "because [the plaintiff] has shown no present physical injury, her cause of action under theories of negligence and strict liability have [sic] yet to accrue." Id. Capital Holding similarly alluded to the fact that public policy require a demonstration of physical illness, noting that "the effect of this order [denying plaintiffs' claims] is to preserve plaintiffs' rights to further pursue tort litigation if and when a '*disease related to the asbestos exposure' should manifest itself.*" 873 S.W.2d at 189 (emphasis added).

Lower courts in Kentucky have also shied away from allowing exposure to dangerous chemicals to stand alone as a cause of action. In Rockwell International Corp. v. Wilhite,

143 S.W.3d 604 (Ky. Ct. App. 2003), for example, the plaintiffs were landowners whose property had been contaminated by minute quantities of polychlorinated biphenyls (PCBs) by the defendant. They brought suit, alleging that this exposure constituted trespass and a nuisance on their property.

In dismissing their claims, the Kentucky Court of Appeals relied in part on Wood. It noted the similarities between injury to property and injury to the body, commenting that in

> the present case, the presence of PCBs currently on the land can be likened to Wood's already-ingested fenfluramine; although the land has been exposed to a substance, PCBs, no present injury to the land has been shown. In contrast, the landowners' theory that the presence of PCBs in itself should be recognized as an injury is analogous to Wood's position regarding her having ingested a potentially harmful or toxic substance (i.e., its mere presence in her body), a theory rejected by the Supreme Court. Were we to adopt the landowners' argument, it would result in an allowance of recovery for alleged injury to property in instances in which individuals who have ingested a toxic substance may not recover.

Id. at 623.

In concluding that the property owners had insufficient grounds upon which to state a claim, the court further noted Wood's public policy rationale that "unfortunate as it may be, the harsh reality of life in the present day is that thousands, if not millions of people, have been exposed to and/or ingested potentially harmful or toxic substances." Id. Although Rockwell is obviously a case about trespass, not about bodily

injury, its dicta and public policy discussions nonetheless help clarify the leanings of the Kentucky courts. Combined with Wood and Capital Holding, this case suggests that a Kentucky court would be averse to allowing a claim based solely upon subcellular damage.

The district court also noted the similarities between this case and Caputo v. Boston Edison Co., No. 88-2126-Z, 1990 U.S. Dist. LEXIS 8546, at *1 (D. Mass. 1990) (unpublished). In that case, a boiler-room worker at a nuclear power station was exposed to heavy doses of radiation. He later sued, alleging physical injury and emotional distress. Like the plaintiffs in the present case, he cited "cellular damage." 1990 U.S. Dist. LEXIS 8546 at *5. Although the bulk of the court's attention was devoted to assessing the expert witnesses' credibility, the court concluded that "even if [the expert's]testimony were admissible, and accepting as true the allegations in plaintiff's affidavit, such *cellular damage does not rise to the level of physical injury as a matter of law* because nothing in the record relates them to any objective symptoms of illness or disease." 1990 U.S. Dist. LEXIS 8546 at *11 (emphasis added).

We acknowledge, however, that a few cases have come down on the other side of the line. The plaintiffs can point to at least two cases that have refused to dismiss tort claims based upon subcellular damage. One is Brafford v. Susquehanna Corp., 586 F. Supp. 14 (D. Colo. 1984), which is directly on point. In that case, the plaintiffs were exposed to waste materials emitted by a uranium milling facility. The trial judge declined to enter summary judgment in favor of the defendants, noting that "I fully understand the impact of defendant's charge that plaintiffs' characterization of subcellular changes as a present injury is an attempt to circumvent the present injury requirement." Id. at 18.

Ultimately, however, the court concluded that "plaintiffs have at least raised a question of fact with respect to whether a present injury in the form of chromosome damage was suffered by the plaintiffs as a result of their exposure to the radiation emitted from the mill tailings." Id.

The other case is Werlein v. United States, 746 F. Supp. 887, 901 (D. Minn. 1990), where the plaintiffs were exposed to water contaminated by the defendants. Like the plaintiffs in the present case, the plaintiffs in Werlein claimed "chromosomal breakage" and "damage to the cardiovascular and immunal systems." Id. In a terse discussion, the court concluded that "the effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to determine whether plaintiffs have suffered present harm." Id. But we are not persuaded by either of these opinions, both because they are not consistent with Kentucky law and because the issue of whether chromosome damage constitutes a "present physical injury" is essentially a legal question, not a factual one.

Ultimately, however, the most persuasive reason to deny the plaintiffs' claims in the present case comes from public policy considerations, many of which have already been articulated by the Kentucky courts. There are three primary concerns with the plaintiffs' position. The first was noted by the court in Wood: "Given that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless." 82 S.W.3d at 857-58 (citations omitted). Accepting the plaintiffs' claim would therefore throw open the possibility of litigation by any person experiencing even the most benign subcellular damage. Based upon the average American's exposure to

chemically processed foods, toxic fumes, genetically modified fruits and vegetables, mercury-laden fish, and hormonally treated chicken and beef, this might encompass a very large percentage of the total population. Nowhere in their arguments do the plaintiffs address these "floodgate" concerns.

Second, allowing this suit to proceed would be of little service to the plaintiffs themselves, particularly in the long run. Kentucky has a "one claim" rule, which limits plaintiffs in tort cases to one chance in which to have their grievances redressed. If this suit is allowed to proceed, the plaintiffs would be able to claim relief for only a nominal injury. After all, as the district court observed, "none of the Plaintiffs is 'sick.'" But they would be left adrift without a legal remedy and without recompense should they later develop a truly debilitating disease. Allowing this suit to proceed would thus do a great disservice to those plaintiffs who might in fact later come down with the very diseases they so rightly fear.

Finally, the plaintiffs fail to explain how damages could presently be calculated. Losses resulting from salient physical diseases such as cancer or asbestosis are at least quantifiable, and courts have familiarized themselves with methods of computing the associated costs of medical care, absences from work, and physical pain. Here, however, the plaintiffs have suggested no mechanisms for calculating losses resulting from subcellular damage. Indeed, the injuries claimed to date have caused no financial losses or impairments. If any damages were to be assessed, they would fall in the realm of the purely theoretical, and would be nearly impossible for a trier of fact to accurately assess.

Although the plaintiffs contend that they have real and concrete physical injuries, the evidence shows that their DNA

damage is harmful only insofar as it is predictive of future disease. The plaintiffs have amply demonstrated that chromosomal damage is directly linked with an increased likelihood of cancer. Indeed, plaintiff Charles Ramsey testified that his main fear was not present injury, but that he was "worried to death what [the radiation] is doing to me . . . 10, 20 years from now." In this sense, the plaintiffs are similarly situated to the plaintiffs in Wood and Capital Holding, whose primary claims were that their exposure to toxic substances had created an increased risk of disease. Those claims were dismissed by the Kentucky Supreme Court because they were premature. The claims of the plaintiffs here are likewise premature. See Wood, 82 S.W.3d at 859 ("Because [the plaintiff] has shown no present physical injury, her causes of action under theories of negligence and strict liability have yet to accrue."). In sum, Kentucky caselaw provides sufficient guidance for us to conclude that, if this case were to be decided in that state's courts, the public policy considerations and the lack of any present physical illness would require the grant of summary judgment in favor of the defendants.

E. Plaintiffs' *Bivens* claims

Plaintiff Classes II-IV brought additional constitutional claims against all of the defendants under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971) (creating a cause of action against federal officials for constitutional violations). The district court dismissed these claims, relying on the Supreme Court case of Correctional Services Corp. v. Malesko, 534 U.S. 61, 151 L. Ed. 2d 456, 122 S. Ct. 515 (2001) (declining to extend Bivens to a suit against a private contractor).

In this appeal, the plaintiffs claim that the district court erred because (1) the court relied on dicta in Malesko, (2) *Bivens* has a wider application than solely where the plaintiff lacks any "alternative remedy for harms caused by unconstitutional conduct," and (3) Bivens does not bar equitable claims. The defendant-operators respond by charging that the plaintiffs are untimely in their appeal of the district court's rejection of their Bivens claims. GE further claims that, because the Price-Anderson Act is the exclusive remedy against operators and suppliers of nuclear reactors, Congress has already established a regulatory regime that precludes Bivens's application.

With regard to the timeliness defense, the district court issued its order denying the plaintiffs' Bivens claims against GE on March 15, 2002, and against the defendant-operators on May 15, 2002. This appeal was taken on August 3, 2003, approximately 14 months after these orders were handed down. Generally, in civil cases, "the notice of appeal must be filed . . . within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1). But Rule 58 requires that a judgment be set forth in a separate document. Fed. R. Civ. P. 58. In this case, the interim orders were not accompanied by a separate judgment in accordance with Rule 58. The final judgment that dismissed all of the plaintiffs' claims was not entered until July 29, 2003. Because the plaintiffs filed their notice to appeal on August 6, 2003, their appeal falls within the 30-day statute of limitations and is therefore timely.

GE's contention that the Price-Anderson Act preempts a Bivens claim has greater merit. The Supreme Court has noted that "when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the

course of its administration, we have not created additional Bivens remedies." Schweiker v. Chilicky, 487 U.S. 412, 423, 101 L. Ed. 2d 370, 108 S. Ct. 2460 (1988); *see also Bivens*, 403 U.S. at 397 (noting that a Bivens remedy would not be available in cases of "explicit Congressional declaration" creating an alternative scheme).

In Schweiker, for example, the Court declined to entertain a Bivens claim brought by plaintiffs claiming disability benefits. It noted the extensive administrative framework that already existed to hear disability claims, and concluded that "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision." Id. at 429 (citations omitted).

Ultimately, therefore, where "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." Id. at 423; see also Bush v. Lucas, 462 U.S. 367, 76 L. Ed. 2d 648, 103 S. Ct. 2404 (1983) ("The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised."); Fishburn v. Brown, 125 F.3d 979, 983 (6th Cir. 1997) ("Since Congress has created statutory provisions that enabled [the plaintiff] to challenge the [government's] actions, she does not have an

actionable Bivens claim for a violation of due process" with regard to her unlawful seizure claim).

The key question, therefore, is whether the Price-Anderson statutory framework excludes a Bivens claim. An examination of the legislative history behind the Price-Anderson Act indicates that Congress indisputably intended for the Act to be the primary remedial mechanism for claims arising out of "nuclear incidents." The Senate, when considering the 1988 amendments to the Act, stated that the purpose behind the Price-Anderson Act was "to assure adequate public compensation in the case of a nuclear accident; and to set a limit on the liability of private industry to remove a major deterrant to private participation in the development of nuclear energy." S. Rep. 100-70(1988). It noted that

> the Price-Anderson system is a comprehensive, compensation-oriented system of liability insurance for Department of Energy contractors and Nuclear Regulatory Commission licensees operating nuclear facilities. Under the Price-Anderson system, there is a ready source of funds available to compensate the public after an accident, and the channeling of liability to a single entity and waiver of defenses insures that protracted litigation will be avoided. That is, the Price-Anderson Act provides a type of "no fault" insurance, by which all liability after an accident is assumed to rest with the facility operator, even though other parties (such as subcontractors or suppliers) might be liable under conventional tort principles. This "omnibus" feature permits a more unified and efficient approach to processing and settlement of claims, thus allowing quick compensation to the public from the pool of funds set up by the Price-Anderson

> system. If damages exceed the limit established by law, the Price-Anderson Act would require Congress to review the situation and determine what action should be taken to make additional funds available to compensate the public.

Id.

In addition, a 2003 Senate Committee Report reauthorizing the Act commented that the Act's impetus was "to ensure that adequate funds would be available to compensate victims of a nuclear accident. [Congress] also recognized that the risk of extraordinary liability that companies would incur if a nuclear accident were to happen would render insurance costs prohibitively high, and thwart the development of nuclear energy." S. Rep. No. 108-218 (2003). That report also notes that "as currently constituted, Price-Anderson places a cap on liability for commercial nuclear facilities and activities licensed by the U.S. Nuclear Regulatory Commission, and allows for deferral of a portion of the payments such licensees must make." Id.

Another committee report explains that "the Price-Anderson Act (PAA) provides for compensation of injured parties in the event of a nuclear accident and sets a maximum liability amount per accident." H.R. Rep. No. 107-299 (2001); see also David M. Rocchio, The Price-Anderson Act: Allocation of Extraordinary Risk of Nuclear Generated Electricity, 14 B.C. Envtl. Aff. L. Rev. 521, 523 (1987) ("In 1957, Congress passed the Price-Anderson Act in an attempt to guarantee that the fledgling private nuclear power industry could develop nuclear power without assuming the high risk involved."). These comments suggest that Congress viewed the Price-Anderson Act as the key federal mechanism for

containing and limiting the legal costs arising out of nuclear incidents.

The plaintiffs counter that the primary purpose of the Price-Anderson Act is not to limit legal liability, but to ensure that nuclear facilities have adequate insurance policies. Even if true, both parties agree that the Act, at a basic level, regulates the ability of individuals to sue as a result of a "nuclear incident." It strictly defines "public liability" to include "*any* legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. § 2014(w) (emphasis added). Because Supreme Court precedent clearly calls for judicial restraint where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations," and because the Price-Anderson Act constitutes such an adequate remedial mechanism, we find no basis for the plaintiffs to bring their *Bivens* claims. See Nieman v. NLO, Inc., 108 F.3d 1546, 1553 (6th Cir.1997) ("Nieman can sue under the Price-Anderson Act, as amended, or not at all."). For these reasons, the plaintiffs' *Bivens* claims were appropriately dismissed by the district court.

F. The plaintiffs' motion to amend their *Bivens* complaint

The plaintiffs claim that the district court erred when it denied them the ability to amend their *Bivens* complaint to explicitly include claims for equitable relief. Based upon our conclusion in Part II.E. above that the Price-Anderson Act is a wide-reaching statutory scheme that prevents federal courts from entertaining Bivens actions for "nuclear incidents," the plaintiffs' argument on this point is moot.

G. Confidential work-product

The final issue of contention between the parties is the disposition of a sensitive piece of attorney-client work product produced by the defendants during the course of discovery, consisting of correspondence that discussed managerial attempts to keep workers ignorant of the dangerous radiation exposure. Under the Agreed Protective Order signed by all the parties, if a party inadvertently produced a document later found to be protected by the attorney-client privilege, "upon request of the producing party, the inadvertently produced document(s) or thing(s) and all copies, notes, compilations, tabulations, analysis or summaries thereof shall be promptly returned to the producing party." The plaintiffs, however, refused to hand over the document after several requests, prompting the magistrate judge involved to order its return.

The plaintiffs now argue that the attorney-client privilege is not applicable because the document will "expose the fraud being perpetrated on the PGDP workers. Thus, the crime-fraud exception to the privilege applies." They further argue that Union Carbide waived its attorney-client privilege when it handed the document over.

The plaintiffs' arguments are unpersuasive. In the grand jury context, the test for claiming the crime-fraud exception is twofold: "First, the government must make a *prima facie* showing that a sufficiently serious crime or fraud occurred to defeat the privilege; second, the government must establish some relationship between the communication at issue and the *prima facie* violation." In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1984).

We have found no caselaw relating to private citizens seeking to claim the crime-fraud exception as a basis to keep

privileged information. Moreover, the plaintiffs fail to cite any facts to support their argument that the document exposes criminal fraud perpetrated by the defendants. They also fail to explain how this one particular document unlocks the secret to the defendants' alleged "crime."

Finally, we are not persuaded by the argument that the defendants waived their privilege when producing the document. The Agreed Protective Order signed by all the parties was clear instating that a producing party waived no rights in the event a privileged document was accidentally produced. In sum, the district court did not err in granting the defendants' request that the plaintiffs return this document.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

No. 5:99-CV-255-M

[July 28, 2003]

ALPHONSE RAINER et al.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
UNION CARBIDE	)
CORPORATION et al.,	)
Defendants-Appellees.	)
	)

FINAL JUDGMENT

This Court having entered its *Memorandum Opinion and Order [DN 253]* on July 11, 2003, granting summary judgment for the defendants; and in light of the Court's previous rulings; and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that all of Plaintiffs' claims against Defendants, Union Carbide Corporation, Lockheed Martin Corporation, Lockheed Martin Energy Systems, Inc.

Lockheed Martin Utility Services, Inc., and/or General Electric Company are dismissed with prejudice.

Pursuant to Fed. R. Civ,. P. 54(a), this is a final judgment and appealable order and there is no just reason for delay.

Dated: 7/28/03 /s/ Hon. Joseph H. McKinley, Jr.,
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

No. 5:99-CV-255

[July 11, 2003]

ALPHONSE RAINER, et al.	)
Plaintiffs,	)
	)
v.	)
	)
UNION CARBIDE CORP., et al.	)
Defendants.	)
	)
	)

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motions for summary judgment filed by Defendants, General Electric Company ("GE") [DN 194], and by Co-Defendants, Union Carbide Corporation, Lockheed Martin Corporation, Lockheed Martin Energy Systems, Inc., and Lockheed Martin Utility Services, Inc. ("Employer Defendants") [DN 196]. The parties have briefed the issues and the matters are ripe for determination. Oral arguments were heard on May 23, 2003. The Court has reviewed the parties' filings and the record herein, and has considered the arguments made by the parties at the summary

judgment hearing. For the reasons set forth below, the Defendants' Motions are GRANTED.

I. BACKGROUND

The facts of this case are well-documented and need not be restated at length. Plaintiffs are former employees of the government contractors who operated the Paducah Gaseous Diffusion Plant (PGDP) and members of those employees' households. As the basis of their various tort claims, Plaintiffs allege that they were exposed to radioactive and other toxic substances from the PGDP and that, as a result, they have suffered compensable injuries.

This action[1] originally involved four classes of plaintiffs but, following the Court's Memorandum Opinion on Preliminary Legal Issues [DN 104], only the claims asserted by Classes II-IV remain.[2] Class II consists of employees who

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[1] On April 12, 2002, the Court entered an Agreed Order [DN 174] consolidating Rainer v. Union Carbide ("Rainer I"), No. 99-CV-255 and Rainer v. Richardson ("Rainer II"), No. 00-CV-220 (which included Dew v. Richardson ("Dew"), No. 00-CV-221). On March 14, 2003, the Court approved the parties' settlement agreement in Dew and dismissed those claims with prejudice [DN 228]. Moreover, certain claims asserted in Rainer I and Rainer II have already been dismissed or otherwise abandoned. Accordingly, the present Memorandum Opinion addresses the remaining negligence, strict liability, and intentional tort claims asserted in Rainer I and Rainer II against GE and the Employer Defendants.

[2] Class I consisted of current and former employees of the operators of the PGDP who asserted common law claims against their employers for injuries received in the course of their employment. All of the Class I plaintiffs' claims were dismissed pursuant to the Court's ruling that the Kentucky Workers' Compensation Act

worked at the PGDP between April 1, 1984 and April 1, 1988 and who assert claims against Union Carbide based on the radioactive "legacy" that it allegedly left behind. Class III consists of employees who worked at the plant between 1952 and 1998 and who assert claims against GE arising from its shipments of contaminated uranium feedstock to the PGDP. Finally, Class IV consists of members of the households of those plaintiffs in Classes II and III.

In August 2000, GE and the Employer Defendants (collectively "Defendants") moved for summary judgment on Plaintiffs' negligence and strict liability claims, arguing that none of the named Plaintiffs had suffered a present physical injury. On March 21, 2002, the Court denied those motions without prejudice, noting that Wood v. Wyeth Ayerst Laboratories --a case then pending before the Kentucky Supreme Court - was slated to address the continued viability of the "present physical injury rule" in Kentucky. The Court declared that it was "unwilling to decide these dispositive motions before a decision is rendered in Wood," but granted the parties leave to "make or renew any Motions on these issues once the Kentucky Supreme Court has spoken." (Order of 03/21/02.) [DN 170].

On August 22, 2002, the Kentucky Supreme Court rendered its decision in Wood and, in accordance with the Court's previous instructions, Defendants now renew their respective motions for summary judgment. In addition, Defendants now expand the scope of their motions to include not only Plaintiffs' negligence and strict liability claims, but also Plaintiffs' intentional tort claims.

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provides the exclusive remedy for such claims.

II. STANDARD OF REVIEW

In order to grant a motion for summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Cir. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of matdrial fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 US. 242, 247-48 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party is required to do more than simply show that there is some "metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Co., 475 U.S. 574, 586 (1986). The Rule requires the non-moving party to present "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson, 477 U.S. at 252.

III. DISCUSSION

A. Price-Anderson Act

As a preliminary matter, the Court must address Defendants' contention that the present controversy is

governed by the Price-Anderson Act ("Price-Anderson" or "the Act"), as mended in 1988, 42 U.S.C. §§ 2011, et seq. The Sixth Circuit has summarized the purpose and effect of Price-Anderson as follows:

> The Price-Anderson Act was enacted in 1957 as an amendment to the Atomic Energy Act to encourage private sector investment in the development of nuclear power by limiting the liability of private owners and operators in the event of a nuclear incident. Under the Act, private owners and operators are required to purchase a speoified amount of insurance, and damages awards over and above that amount are then indemnified by the government. In August, 1988, Congress enacted the Price-Anderson Amendments Act of 1988, creating a federal cause of action for 'public liability actions' arising from nuclear incidents. The federal courts were granted jurisdiction over these actions, and actions filed in state court were subject to removal. The amendment was not intended to alter the state law nature of the underlying tort claims. It provides that "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident occurs, unless such law is inconsistent with the provisions of such section."

Day v. NLO, Inc., 3 F.3d 153, 154 n.1 (6th Cir. 1993) (internal citations to Price-Anderson omitted). As set forth above, Price-Anderson creates a federal cause of action for "public liability actions" arising from "nuclear incidents." The Act defines "public liability," in relevant part, as "any legal liability arising out of or from a nuclear incident," and a "public liability action" as- "any suit asserting public liability." 42 U.S.C. § 2014(w), (hh). "Nuclear incident," in

turn, is defined as "any occurrence... within the United States causing... bodily injury, sickness, disease, or death, or loss of or damage to property... arising out of or resulting from the radioactive; toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." Id., at § 2014(q).

Without question, the claims asserted here fall squarely within the statutory language of the Act Specifically, Plaintiffs' suit asserts "legal liability" for DNA and chromosomal damage resulting from their exposure to the radioactive properties of uranium, plutonium, and neptunium.[3] As such, Price-Anderson effectively preempts Plaintiffs' state law tort claims. See Nieman v. NLO, Inc, 108 F.3d 1546, 1553 (6th Cir. 1997) (holding that Price-Anderson preempted state law trespass claim such that plaintiff could "sue under the Price-Anderson Act, as amended, or not at all.").

Evén so, Kentucky law still provides the substantive rules in deciding Plaintiffs' "federal" claims, so long as such law is not inconsistent with the Act. 42 U.S.C. § 2014 (hh). On this point, the Court finds, and the parties appear to agree, that Kentucky law is consistent with the provisions of Price-Anderson --at least insofar as Plaintiffs' negligence and Strict

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[3] The Act defines ordinary uranium as a "source material" and enriched uranium and plutonium as "special nuclear material[s]." 42 U.S.C. § 2014(z). Neptunium, in turn, would be classified as a "byproduct material," because it is "yielded or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material [i.e., plutonium]." Id., at § 2014(e).

liability claims are concerned.[4] Accordingly, the Court will look to Kentucky tort law in evaluating those claims.

B. Plaintiffs' Negligence and Strict Liability Claims[5]

In Wood v. Wyeth-Averst Laboratories, 82 S.W.3d 849 (Ky. 2002), the Kentucky Supreme Court re-affirmed the long standing notion that, in Kentucky, "to recover on a theory of tort, like negligence or strict liability," the law "requires a plaintiff to show some present physical injury to support a cause of action." Wood, 82 S.W.3d at 851-52 (emphasis added). In the present case, Plaintiffs specify "chromosomal damage" as the present physical injury supporting their negligence and strict liability claims. Defendants do not dispute Plaintiffs' allegation that certain named plaintiffs have suffered chromosomal damage[6] but rather, insist that summary judgment in their favor is warranted because this type of harm does not constitute a present physical injury. Thus, the paramount issue before the Court is whether the chromosomal

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[4] Specifically, Kentucky's present physical injury rule-applicable to Plaintiffs' negligence and strict liability claims- is consistent with Price-Anderson's requirement of "bodily injury, sickness, disease, or death, or loss of or damage to property." 42 U.S.C. § 2014(q); see also In re Berg Litig., 293 F.3d 1127, 1131 (9th Cir. 2002) (holding that "physical harm to persons or property" is a "jurisdictional prerequisite" to bringing a claim under Price-Anderson). The effect of Price-Anderson on Plaintiffs' intentional tort claims is discussed in Part III.C., infra.

[5] Plaintiffs' strict liability claims include claims for both "strict products liability," as well "ultra-hazardous activity strict liability."

[6] Defendants do note, however, that the record is devoid of any evidence of chromosomal damage in anyone other than Alphonse Rainer, Charles Ramsey, and David Sacharnoski.

damage alleged by Plaintiffs constitutes a present physical injury under Kentucky law.

Although Kentucky clearly requires a present physical injury to recover on a theory of tort, the precise issue of whether chromosomal damage constitutes such an injury appears to be an issue of first impression. As such, the Court must predict how the Kentucky Supreme Court would rule if it were confronted with this question. See Managed Health Care Associates, Inc. v. Kethan, 209 F.3d 923, 927 (6th Cir. 2000). In so doing, the Court must ascertain the state law from "all relevant data," including "state appellate court decisions, supreme court dicta, restatements of law, law review commentaries, and the majority rule among other states." Hisrich v. Volvo Cars of N. Am. Inc. 226 F.3d 445, 449 n.3 (6th Cir. 2000) (citing Garden City Osteopathic Hosp. V. HBE Corp., 55 F.3d 1126, 1130 (6th Cir. 1995)). In addition, the Court may look to other jurisdictions that have addressed the issue as persuasive authority. Managed Health Care Associates, 209 F.3d at 929. In this case, the "relevant data" includes: (1) prior Kentucky decisions, including dicta from the Kentucky Supreme Court's decision in Wood; (2) decisions from other jurisdictions that have confronted this precise issue; and (3) the Restatement (Second) of Torts (also cited in Wood).

As set forth above, the Wood decision represents the Kentucky Supreme Court's most recent pronouncement regarding the present physical injury role. To fully understand the holding in Wood, however, it is helpful to first examine the Kentucky Supreme Court's earlier decision in Capital Holding Corporation v. Bailey, 873 S.W.2d 187 (Ky. 1994). In Capital Holding, a construction worker asserted claims against his employer for negligence and intentional infliction of emotional distress resulting from his exposure to asbestos.

Although the plaintiff had not yet developed cancer, he argued that he had suffered a compensable injury in the form of an increased risk of cancer, as well as emotional distress from the fear of developing cancer. Thus, the court was faced with two "complex questions": (1) at what point a tort claim for asbestos exposure accrues; and (2) "whether damages may be recovered when there is no present manifestation of a diseased condition." Id. at 189. In response to the first question, the court held that "no cause of action accrues until the potentially harmful exposure actually 'causes injury that produces loss or damage.'" Id. at 192 (quoting Louisville Trust Co. v. Johns-Manville Products, 580 S.W.2d 497, 500 (Ky. 1979) (quoting Saylor v. Hall, 497 S.W.2d 218, 225 (Ky. 1973)). As to the second question, the court held that "mere ingestion of a toxic substance does not constitute sufficient physical harm upon which to base a claim for damages." Id. at 195. Thus, because the plaintiff in that case had failed to prove any harmful result from his exposure to asbestos, the court concluded that his claims did not allege a present physical injury sufficient to survive summary judgment. Id.

Eight years later, in Wood the Kentucky Supreme Court was again asked to address the present physical injury rule. In that case --a class-action lawsuit involving the diet drug fenfluramine – the present physical injury alleged by the plaintiff was "significantly increased risk of serious injury and disease." Wood, 82 S.W.3d at 851. Although the named plaintiff had not yet manifested any symptoms of disease or illness, she sought to recover future medical costs that she would likely incur in monitoring her condition. Both the trial court and the Kentucky Court of Appeals rejected plaintiff's theory of recovery, finding that she had not alleged sufficient present physical harm to support her claim. The plaintiff appealed and, in light of recent developments in toxic tort

litigation in other states, the Kentucky Supreme Court granted discretionary review to decide "whether the injury required by Capital Holding was intended to be narrowly construed and evidenced by present physical symptoms or illness, or, as Appellant contends, broadly inclusive of any subjective harm, present or anticipated, resulting from a defendant's irresponsible conduct." Id. at 854.

The court ultimately decided in favor of a narrow construction of the present physical injury rule, thus affirming both the trial court and the Court of Appeals. In reaching this conclusion, the court relied not only upon Capital Holding and cases cited therein, but also looked to the Restatement, as well as public policy considerations, for guidance. First, the court examined the Restatement's definition of "physical harm" as "physical impairment of the human body, or of tangible property ...." Wood, 82 S.W.3d at 855 (quoting Restatement (Second) of Torts § 7, cmt. e (1965)). Under this definition, the court concluded that the plaintiff had not suffered a present physical injury, noting that, "Appellants body has not yet been impaired by her ingestion of fenfluramine, and the only tangible property in question is Appellant's money, which likewise has not been expended." Id.

In addition, the court noted that public policy considerations favor a narrow construction of the present physical injury rule. Paramount among these considerations was preserving a remedy for those who actually become ill after being exposed to hazardous substances. Because a plaintiff in Kentucky may bring only one claim for a given cause of action, the court properly recognized that the present physical injury requirement "is essentially a safeguard that benefits victims." Id. at 858. With that, the court reasoned that allowing claims based on mere exposure could result in

a "'flood' of less important cases (potentially absorbing resources better left to those more seriously harmed)." Id. at 857 (quoting Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 442, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997)).

Thus, having considered both the meaning of "physical harm," as well as the public policy implications underlying the present physical injury rule, the court held that

> To interpret Capital Holding as authorizing a cause of action where a person is harmed in any manner not only undermines the obvious intent of the Court, but also produces an absurd result. Without an actual injury requirement, any subjective harm suffered by any person could give rise to tort liability. In the arena of toxic or harmful substances, any exposure might result in litigation, supported only by speculative fears of future injury and costs. We can only construe as standing for the continued requirement of apresent physical injury as a precursor to a cause of action for negligent exposure to a potentially dangerous substance, and we hold today that this rule still prevails.

Id. at 856. After stating the general rule, the court noted that, "[h]aving suffered no actual loss or detriment, nor any harm in the legal sense, Appellant can prove at most that she ingested fenfluramine, a potentially toxic substance." Id. Hence, applying the rule articulated in Capital Holding (i.e., that "mere ingestion" of a harmful substance cannot support a claim for damages), the court concluded that the plaintiff had not sustained a present physical injury, Id.

Of course, Plaintiffs' theory of recovery in this case differs considerably from those put forward by the plaintiffs

in Wood and Capital Holding. In those cases, the plaintiffs presented no credible evidence of physical injury. Rather, they sought compensation for emotional and financial harm resulting from their increased risk of becoming ill in the future. Here, by contrast, Plaintiffs have adduced expert testimony from renowned nuclear physicists concluding that Plaintiffs have suffered an actual physical injury in the form of DNA and chromosomal damage. Although the question of whether this type of damage constitutes a present physical injury is one of first impression in Kentucky, courts from other jurisdictions have addressed the issue.

In particular, the Court finds Caputo v. Boston Edison Co., 1990 WL 98694 (D. Mass. 1990) to be squarely on point. In that case, the plaintiff asserted various tort claims after being exposed to excessive radiation while working at Boston Edison's nuclear power plant. There, as in the present case, the only evidence of physical injury was cellular and chromosomal damage testified to by the plaintiff's expert. On summary judgment, the defendant argued that this type of injury was insufficient under Massachusetts' version of the present physical injury rule. The District Court for the District of Massachusetts agreed. Unlike here, the court in Caputo harbored considerable doubt as to the credentials and methodology of the plaintiff's expert. Nevertheless, it ultimately concluded that, even accepting as true the plaintiff's allegations of chromosomal damage, "such cellular damage does not rise to the level of physical injury as a matter of law because nothing in the record relates them to any objective symptoms of illness or disease." Id. at *4 (citations omitted). Cf. Schweitzer v. Consolidated Rail, 758 F.2d 936, 942 (3rd Cir. 1985) (concluding that subclinical injury resulting from exposure to asbestos was insufficient loss or damage to sustain a cause of action under generally applicable principles of tort law).

Not all courts have reached this conclusion. See Brafford v. Susqnehana Corp., 586 F.Supp. 14, 18 (D. Colo. 1984) (denying summary judgment where plaintiffs "at least raised a question of fact with respect to whether a present injury in the form of chromosome damage was suffered by the plaintiffs as a result of their exposure to... radiation"); Werlein v. United States, 746 F.Supp. 887, 901 (D. Minn. 1990) (holding that plaintiffs' evidence of subcellular injuries resulting from exposure to toxic chemicals was sufficient to survive summary judgment). Nevertheless, based on the principles articulated in Wood and oases cited therein, the Court believes that the Kentucky Supreme Court would concur with the district court's conclusion in Caputo that a present physical injury requires objective symptoms of illness or disease or, at the very least, some physical harm.

That being said, it is undisputed that none of the Plaintiffs here currently manifests any symptoms of illness or disease resulting from radiation exposure. Nor has the injury alleged by Plaintiffs resulted in any physical harm, i.e., "physical impairment of the human body." Restatement (Second) of Torts § 7, cmt. e (1965). As explained by the Restatement, "[h]arm implies a loss or detriment to a person, and not a mere change or alteration ... Physical changes or alterations may be either beneficial, detrimental, or of no consequence to a person" Id. at cmt. b (emphasis added). Here, the chromosomal damage alleged by Plaintiffs is more akin to a "mere change or alteration" which, unless and until some harmful result ensues, it is of no consequence to those afflicted.

Moreover, allowing Plaintiffs to go forward with the present claims would not serve the public interest. The function of the present physical injury rule is to serve the underlying purpose of tort law, namely, the compensation of

victims who have suffered. In light of Kentucky's "one-claim" rule, however, if Plaintiffs were to recover now for their symptomless chromosomal damage, they would have no further remedy should they ultimately develop cancer or some other exposure-related malady. As such, allowing recovery based on the type of damage alleged here would likely result in a "windfall[] for those who never take ill and insufficient compensation for those who do." Schweitzer, 758 F.2d at 942.

Finally, and perhaps most significantly, the Kentucky Supreme Court has already determined that the present physical injury rule should be narrowly construed. To allow Plaintiffs' negligence and strict liability claims to proceed based on these types of "injuries" - chromosomal aberrations that have not yet produced any objective symptoms of illness, disease or harm - would be wholly inconsistent with that determination. In the end, the comprehensive scientific data proffered by Plaintiffs' experts, while impressive, simply cannot overcome the following admittedly unscientific observation: none of the Plaintiffs is "sick." Accordingly, because this Court is of the opinion that Plaintiffs' chromosomal damage does not constitute a present physical injury under Kentucky law, Defendants are entitled to summary judgment on Plaintiffs" negligence and strict liability claims.

C. Plaintiffs' Intentional Tort Claims

In addition to the negligence and strict liability claims discussed above, Plaintiffs also assert various intentional tort

claims.[7] As set forth in Part III.A., all of Plaintiffs' tort claims, including their intentional tort claims, are effectively preempted by Price-Anderson Thus, although Kentucky law still provides the substantive rules for decision, those rules may only be applied to the extent that they are consistent with the provisions of the Act.

In In re Berg Litigation, 293 F.3d 1.127 (9th Cir. 2002), a recent decision of the Ninth Circuit Court of Appeals, the court discussed the relationship between Price-Anderson and state tort law. In that case, also involving radiation exposure, the plaintiffs brought claims for emotional distress and medical monitoring[8] which, under Washington law, could be asserted even in the absence of any physical injury. The district court held that plaintiffs' claims were cognizable under Price-Anderson. The Ninth Circuit reversed, however, holding that - in light of the Act's definition of "nuclear incident" as an occurrence causing "bodily injury, sickness, disease or death" - it follows that "[p]hysical harm to persons or property is thus a jurisdictional prerequisite." In re Berg, 293 F.3d at 1131. Hence, the court concluded that "although Washington law permits emotional distress claims in the

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[7] The remaining intentional tort claims from Rainer I include claims for medical monitoring, battery, and intentional infliction of emotional distress (IIED). The remaining intentional tort claims from Rainer II, in addition to the aforementioned claims, include claims for assault, fraud, deceit, misrepresentation, conspiracy, concert of action, and joint venture.

[8] The Kentucky Supreme Court has now made it clear that Kentucky does not recognize a cause of action for medical monitoring. See Wood, 82 S.W.3d at 859 (holding that medical monitoring is merely an element of damages and does not constitute an independent cause of action).

absence of physical injury, allowance of such claims here would be inconsistent with the Act's "bodily injury' requirement." Id. (citation omitted).

In light of the Ninth Circuit's decision in In re Berg, Defendants now expand their original motions for summary judgment to include not only Plaintiffs' negligence and strict liability claims, but also Plaintiffs" intentional tort claims. Defendants contend that they are entitled to summary judgment on Plaintiffs' intentional tort claims because, like the claims asserted in In re Berg Plaintiffs' claims here cannot satisfy the Act's jurisdictional prerequisite of "bodily injury." The Court agrees.

The Court finds persuasive the Ninth Circuit's conclusion that allowing state law tort claims to proceed under Price-Anderson, in the absence of any bodily injury, would be inconsistent with the Act's requirement of physical harm. See In re Berg, 293 F.3d at 1131 (holding that State law tort claims for medical monitoring and emotional distress, absent some physical harm, failed to meet the jurisdictional requirements of Price-Anderson). The Court has already concluded that Plaintiffs have not suffered any bodily injury - i.e., any present physical injury,[9] under Kentucky law. Thus, because Plaintiffs' intentional tort claims fail to satisfy Price-Anderson's jurisdictional prerequisite of physical harm, those claims likewise cannot survive summary judgment.

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[9] In In re Berg, the court noted that both the Supreme Court and the Ninth Circuit have interpreted the terms "bodily injury" and "present physical injury" as being essentially synonymous. In re Berg, 293 F.3d at 1132 (citing Eastern Airlines Inc. v. Floyd, 499 U.S. 530, 542, 111 S.Ct. 1489, 113 LEd.2d 569 (1991); Carey v. United Airlines, 255 F.3d 1044, 1052 (9th Cir. 2001)).

IV. CONCLUSION AND ORDERS

Accordingly, and for the reasons set forth above, IT IS HEREBY ORDERED that the motions for summary judgment by GE [DN 194] and the Employer Defendants [DN 196] are GRANTED.

This the 11th day of July 2003.

/s/ Joseph H. McKinley, Jr.
Judge, United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY AT PADUCAH

No. 5:99CV-255-M

[May 2, 2003]

ALPHONSE RAINER, et al.	)
Plaintiffs,	)
	)
v.	)
	)
UNION CARBIDE CORP., et al.	)
Defendants.	)
	)
	)

MEMORANDUM OPINION AND ORDER

Before the Court is defendants consolidated motion to compel, for a protective order, to strike, and for reasonable expenses incurred (DN 229). Essentially, defendants are seeking from the Court an order that: (1) compels plaintiffs to return an inadvertently produced document that contains a privileged communication between attorney and client; (2) prohibits plaintiffs from introducing and/or making any reference to said document in the future; (3) strikes from the

Court's record[1] any and all references to this document that may have already occurred; and (4) award defendants reasonable expenses, including attorneys fees, caused by plaintiffs' failure to return the document (DN 229).

Plaintiffs object to said motion because they believe defendants have failed to satisfy their burden of demonstrating the document is a privileged communication between attorney and client (DN 232). Alternatively, plaintiffs' set forth four different reasons why they think defendants have waived the attorney-client privilege as to this document (DN 232). Finally, plaintiffs contend the crime-fraud exception to the attorney-client privilege applies to the document (DN 232). By their silence, plaintiffs apparently concede that if the Court finds the subject document is privileged then Paragraph 8 of the Agreed Protective Order mandates return of the document to defendants.

In reply, defendants set forth argument with a corroborating affidavit from G. Wilson Horde, former in-house counsel to Union Carbide, and exhibits in an effort to satisfy their burden of demonstrating the document is a privileged communication between attorney and client (DN 235, 238). Defendants also set forth the reasons why they do not believe a waiver of the privilege has occurred (DN 235). Finally, defendants explain why the elements of the crime-fraud exception are not satisfied (DN 235).

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[1] Defendants contend pursuant to Paragraph 8 of the Agreed Protective Order they have formally requested return of the inadvertently produced privileged document (DN 229). According to defendants, plaintiffs have refused to return the document despite their duty to do so under Paragraph 8 of the Agreed Protective Order (DN 229).

Plaintiffs, citing one section of Fed.R.Evid. 501, argue since this is a diversity case and Kentucky law provides the rule of decision as to the claims and defenses raised by the parties then Kentucky law on privilege should be applied to this dispute (DN 232). Star Editorial v. U.S. Dist. Ct. C.D. Cal.,7 F.3d 856, 859 (9th Cir. 1993). Defendants, citing another section of Fed.R.Evid. 501, contend since the action is governed by the Price-Anderson Act then federal common law should be applied to this dispute (DN 235) See Hancock v. Dodson, 958 F.2d 1367, 1373 (6th Cir. 1992); Humphreys, Hutcheson and Moseley v. Donovan, 755 F.2d 1211, 1219 n. 12 (6th Cir. 1985). Alternatively, defendants point out since the elements under federal common law are essentially the same as those enunciated by the Kentucky Supreme Court in Lexington Public Library v. Clark, 90 S.W.3d 53, 58 (Ky. 2002), the Court should find the privilege applies under either legal framework (DN 235).

Plaintiffs brought a diversity action and defendants have recently argued, in their summary judgment memoranda, that the Price-Anderson Act preempts be diversity action. Since that issue has yet to be resolved by the Court, the undersigned has evaluated the dispute under both laws of privilege and concludes that the result will be the same.

At issue is a document dated October 8, 1964 labeled "internal correspondence" from W.L. Harwell with the Legal and Information Control Department of the Nuclear Division of Union Carbide. The written communication is addressed to R.W. Levin at the "Paducah Plant" with copies to R.C. Baker and E.C. Cain. The communication addresses a request for approval for public dissemination of a paper written by R.C. Baker.

The question of whether the attorney-client privilege applies to a document is a mixed question of fact and law. Reed v. Baxter,134 F.3d 351,355 (6th Cir. 1998) (citation omitted); Lexington Public Library, 90 S.W.3d at 62. The party asserting a claim of privilege has the burden of satisfying each element of the privilege. Under federal common law and Kentucky law, the essential elements of the privilege are as follows: (1) a communication made in confidence, (2) between privileged persons, (3) for the purpose of seeking or obtaining legal advice or assistance, (4) are at the client's instance permanently protected from disclosure, (5) unless the protection is waived. Reed, 134 F.3d at 355 (citing Fansek v. White, 965 F.2d 126, 129 (6th Cir. 1992, and United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir.1964)); K.RE 503(a), (b), and (c); Lexington Public Library, 90 S.W.3d at 58-63.

"Privileged persons" are the client, a representative of the client, the lawyer, and a representative of the lawyer. Upjohn v. United States, 449 U.S. 383, 390-397 (1981); Reed. 134 F.3d at 355-356; KRE 503 (a)(1)-(4); Lexington Public Library, 90 S.W.3d at 58-63. There is no dispute that the "client" is Union Carbide. In the corporate setting a "representative of the client" can be a person having the authority to obtain professional legal services or to act on legal advice rendered to the corporate client. Upjohn, 449 U.S. at 390-397; KRE 503(a)(2)(A). However, a "representative of the client" can also be an employee who makes or receives a confidential communication in the course and scope of his or her employment about the subject matter of his or her employment in order to effectuate legal representation for the client. Upjohn, 449 U.S. at 390-397; KRE 503(a)(2)(B); Lexington Public Library, 90 S.W.3d at 58-60; Robert G. Lawson, The Kentucky Evidence Law Handbook, § 5.10 at 245-248 (3d ed. 1993). There is no

dispute that Mr. Levin was a "representative of the client" at the time he received the communication from Mr. Harwell (DN 232 at 8-9). Nor is there any dispute that Messrs. Baker and Cain were "representatives of the client" at the time they received copies of the communication from Mr. Harwell to Mr. Levin (DN 232 at 8-9).

Plaintiffs first argue the defendants have provided no evidence to substantiate their claim that Mr. Harwell was an attorney (DN 232 at 8-9). Next, plaintiffs contend defendants have not presented evidence concerning the type of legal advice reflected in the correspondence (DN 232 at 8-9).

Based on a review of the October 8, 1964 correspondence, the affidavit of G. Wilson Horde, and other materials submitted by defendants (DN 235, 238), the undersigned makes the following findings. The document at issue is a communication made in confidence by Mr. Harwell, an attorney, in response to a request for a legal opinion by Mr. Levin in the Paducah Gaseous Diffusion Plant ("Paducah Plant"). Mr. Harwell rendered a legal opinion that addresses the appropriateness of publicly disseminating a paper written by Mr. Baker which is entitled "Neptunium-237 Contamination Control and Evaluation of Employee exposure." In sum, there is no merit to the first and second arguments by plaintiffs.

Alternatively, plaintiffs argue it is clear that the information provided to Mr. Harwell was not kept in confidence as reflected in the reference to a review of the Baker paper by Wayne Range, a Public Information Officer with the Atomic Energy Commission (DN 232 at 9). However, there is no claim that the paper written by Mr. Baker is privileged nor is it necessary for the document conveyed to Mr. Harwell to be confidential information; it is

sufficient that it is conveyed in confidence and in the context of an attorney-client relationship. Edna Selan Epstein, The Attorney-Client Privilege and Work-Product Doctrine, American Bar Association Section of Litigation at 168 (4th ed. 2001). Thus, plaintiffs' argument is without merit.

Though not an issue expressly raised by plaintiffs, the undersigned finds Union Carbide has expressly indicated that it is exercising its privilege to refuse to disclose and to prevent any other person from disclosing this confidential communication. In sum, defendants have satisfied their burden as to the first four elements identified above. That takes the Court to the final element, has the privilege been waived?

Plaintiffs argue defendants waived the attorney-client privilege because the text of the confidential communication indicates disclosure to an unrelated third party, Mr. Range.[2] See United States v. Dakota, 197 F.3d 821,825-826 (6th Cir. 1999); In re von Bulow, 828 F 2d 94, 101 (2d Cir. 1987); Drimmer v. Appleton, 628 F.Supp. 1249, 1252 (S.D.N.Y. 1986). The undersigned agrees with the defendants' contention that the conduct in this case is not analogous to the conduct found to create a waiver in the cases cited by the plaintiffs. Union Carbide operated the Paducah Plant under the terms of a contract with the Atomic Energy Commission, which was the owner of the plant and the regulatory agency in charge of overseeing operations at the plant. The affidavit and exhibits submitted by defendants (DN 235, 238) substantiate defendants' claim that Union Carbide was

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[2] Plaintiffs focus on a sentence in the letter that mentions Mr. Range reviewed the Baker paper and concurred with Mr. Harwell's opinion.

contractually required to submit the Baker paper to Mr. Range's office and obtain approval before it could be publicly disseminated.

The undersigned concludes that plaintiffs' position is untenable because it eviscerates the attorney-client privilege any time a business enters into an operational contract that includes a review and approval provision similar to the one set forth in the contract between Union Carbide and the Atomic Energy Commission. The review and approval provision within the contract is akin to when two or more clients share a common legal or commercial interest and, therefore, share legal advice from one attorney with respect to that common interest.[3] Edna Selan Epstein, The Attorney-Client Privilege and Work-Product Doctrine, American Bar Association Section of Litigation at 196-197, 203-206 (4th ed. 201); Robert G. Lawson, The Kentucky Evidence Law Handbook, § 5.10 at 245 (3d ed. 1993). There are two lines of cases, one line insisting that the common interest must be legal in nature for the privilege to apply to any information shared among the parties. Epstein, supra at 203-206. The other line of cases involves a broader standard that allows sharing of legal advice even if the interest is primarily commercial or financial in nature. Id. Since the common interest here is legal in nature, the undersigned finds the narrower of the two standards is satisfied.

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[3] This "joint client" or "common interest" relationship that existed between Union Carbide and the Atomic Energy Commission is different from the "joint defense" or "common interest" relationship that KRE 503(b)(3) addresses. The privilege set forth in KRE 503(b)(3) is limited to communications during a "pending action" between co-defendants or co-plaintiffs represented by different counsel. Robert G. Lawson, The Kentucky Evidence Law Handbook, § 5.10 at 238.

Next, plaintiffs contend Union Carbide waived the attorney-client privilege when it surrendered all documents pertaining to its operations at the Paducah Plant to USEC and Bechtel Jacobs, LLC, who are unrelated third parties. Defendants argue under the terms of the operating contact all records related to Union Carbide's operation of the Paducah Plant were the property of the federal government and had to be retained or disposed of as the Department of Energy directed. (DN 235, Exhibits 1 and 2 to Horde Affidavit). Defendants assert although the privilege is Union Carbide's, the Harwell document was and remains government property. Further, argue defendants, the Department of Energy has the right to direct custody to be transferred to each succeeding contractor.

The undersigned finds plaintiffs' argument untenable because it seeks to eviscerate the attorney-client privilege based on a provision within the operational contract between Union Carbide and the Government. The undersigned finds that the contractual relationship established a "common interest" between Union Carbide and the Government whereby confidential communications are clearly privileged from the disclosure at the instance of a third party such as plaintiffs' herein. Epstein, supra, at 203-206. Lawson, supra, at 245. In sum, Union Carbide did not waive the attorney-client privilege as to this document by surrendering all documents pertaining to its operations at the Paducah Plant when the term of the operational contract ended.

Next, plaintiffs assert that defendants waived the attorney-client privilege because they failed to describe the Harwell document in a privilege log as required by Fed.R.Civ.P. 26(b)(5) and Paragraph 3 of the Agreed Protective Order. Defendants contend the argument fails for two reasons. First, a privilege log typically is provided at the conclusion of a

document production "when the universe of responsive privilege documents withheld is known" (DN 235 at 8). Defendants reason in a large document production such as we have here, any other approach would require the creation of multiple piecemeal logs, a result defendants believe is not required by Fed.R.Civ.P. 26(b)(5) or the Agreed Protective Order. Next, defendants assert before plaintiffs filed their response to the motion defendants had already informed plaintiffs that they were asserting a claim of privilege for the Harwell document.

Both parties seem to overlook the obvious, since plaintiffs are in possession of a copy of the Harwell document they do not need a description of the document, as required by Fed.R.Civ.P. 26(b)(5) and Paragraph 3 of the Agreed Protective Order, in order to respond to defendants' contention that the document is privileged. In sum, defendants' failure to comply with Fed.R.Civ.P. 26(b)(5) and Paragraph 3 of the Agreed Protective Order is harmless and the remedy of waiver is inappropriate.

Finally, plaintiffs contend the Harwell document is excepted from the attorney-client privilege by the crime-fraud exception (DN 232). Plaintiffs assert from the text of the document, it is clear that Mr. Harwell was well aware of the ongoing misrepresentations to the workers at the Paducah Plant and his advice to suppress Mr. Baker's report was intended to prevent the workers from learning of the misrepresentation. Plaintiffs allege Mr. Harwell's direct participation in defendants' scheme to deceive the workers and the public obviates the application of the attorney-client privilege.

Defendants argue application of the crime/fraud exception is not appropriate here because plaintiffs have not (1) made *a*

prima facie showing that a sufficiently serious crime or fraud occurred and (2) established a relationship between the privileged communication and the *prima facie* violation shown. Defendants contend the first and dispositive reason that plaintiffs cannot make the requisite *prima facie* showing of fraud is that plaintiffs have no remaining claims for fraudulent concealment or misrepresentation to workers in 1964 or at any other time while Union Carbide was operating the plant (DN 235 at 11). Defendants point out the Court dismissed plaintiffs' outrage claim because all claims of plaintiffs who had worked for Union Carbide at the Paducah Plant were barred by the workers' compensation exclusive remedy provision (DN 235 at 11, citing DN 104 at 17-18 and 20-21). Defendants reason since there is no viable fraud claim, the crime-fraud exception to the attorney-client privilege cannot apply herein (DN 235 at 11). The undersigned agrees.

Alternatively, defendants argue that at best plaintiffs have made bare allegations of fraud because they have not been able to come up with any evidence of fraud (DN 235 at 11-12). Defendants assert that plaintiffs in making their argument mis-characterized the content of the letter from Mr. Baker to' Mr. Butler (DN 232, Exhibit 4) in an effort to substantiate their claim of fraud (DN 235 at I 1-12). After reviewing Exhibit 4 to plaintiffs' response (DN 232), the undersigned agrees with defendants. Additionally, defendants argue that plaintiffs have demonstrated no relationship between the Harwell communication and the fraud alleged by plaintiffs (DN 235 at 12-14). The undersigned agrees. In sum, there is no merit to plaintiffs' contention that the Harwell document is excepted from the attorney-client privilege by the crime-fraud exception.

For the reasons set forth above the undersigned concludes that defendants have satisfied their burden of demonstrating the Harwell document is a privileged communication between attorney and client representatives. Furthermore, there is no merit to plaintiffs' contentions that defendants waived the attorney-client privilege as to this document. Nor is there any merit to plaintiffs' contention that the crime-fraud exception vitiates the attorney-client privilege as to this document.

ORDER

IT IS HEREBY ORDERED as follows:

(1) Within twenty (20) days of entry of this order, plaintiffs shall return to defendants alt copies of the Harwell document that are in their possession, custody or control;

(2) Absent further direction from the Court, plaintiffs are prohibited from reproducing, publishing, referring to, and/or making any use whatsoever of the Harwell document;

(3) The Harwell document, ineluded in plaintiffs' response to defendants' surreply memorandum in opposition to Rainer plaintiffs' motion to amend the pleadings (DN 224, Appendix A Tab 14) and all other references to said document, shall be stricken from the record in this consolidated case. The Clerk of the Court is directed to remove the copy of said document from DN 224, Appendix A, Tab 14 and file it under seal; and

(4) Defendants' request for reasonable expenses is DENIED because plaintiffs' memorandum (DN 232) sets forth an arguable basis for challenging defendants' assertion of the attorney-client privilege as to the Harwell document.

This 2nd day of May, 2003.

/s/ E. Robert Goebel
UNITED STATES MAGISTRATE JUDGE

Copies to: Counsel of Record

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

No. 5:99-CV-255

[February 19, 2003]

ALPHONSE RAINER, et al.	)
Plaintiffs,	)
	)
v.	)
	)
UNION CARBIDE CORP., et al.	)
Defendants.	)
	)
	)

OPINION AND ORDER ON *RANIER* PLAINTIFFS' MOTION TO AMEND THE PLEADINGS

This matter is before the Court on the Rainer Plaintiffs' Motion to Amend the Pleadings [DN 195], wherein Plaintiffs request leave to amend the pleadings to add Sylvia Mathis as a party plaintiff in both actions[1] and to assert claims for unjust

[1] The two actions at issue are Ranier v. Union Carbide Corp., (Civil Action No. 5:99-CV-255-M) ("Ranier I"), and Ranier v. Richardson, (Civil Action No. 5:00-CV-220-M) ("Ranier

enrichment and disgorgement of profits against Defendants in Ranier II. For the reasons set forth below, Plaintiffs' Motion is GRANTED in part and DENIED in part.

"If a proposed amendment would not withstand a motion to dismiss, leave to amend should be denied." Tidik v. Ritsema, 938 F.Supp. 416, 426 (E.D. Mich. 1996) (citing Keweenaw Bay Indian Cmty. v. State of Mich., 11 F.3d 1341, 1348 (6th Cir. 1993)). As such, when deciding whether to grant a motion to amend, a court must accept the plaintiff's factual allegations as true, but "need not accept as true legal conclusions or unwarranted factual inferences." Murphy v. Sofamor Danek Group, Inc.(In re Sofamor Danek Group, Inc.), 123 F.3d 394, 400 (6th Cir. 1997) (internal quotation marks and citation omitted).

Having had their claim for money damages foreclosed by Corr. Services Corp. v. Malesko, 534 U.S. 61, 122 S. Ct. 515, 151 L.Ed.2d 456 (2001), Plaintiffs wish to amend their complaint to assert an equitable claim of unjust enrichment with disgorgement as a remedy. In support of the present Motion, Plaintiffs contend that the Malesko decision "did not limit the availability of equitable relief against federal agencies or corporate defendants, such as Union Carbide, Martin Marietta, Lockheed Martin or General Electric for violations of the United States Constitution." (Pls.' Reply Mem. at 1) (emphasis added).

The Supreme Court in Malesko recognized that the original purpose of a Bivens claim was to deter the conduct of individual federal actors. If suits against corporate defendants

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II"), which have been consolidated under the caption of Ranier I.

were allowed, the Supreme Court believed that claimants would focus their attention on corporations instead of the individuals directly responsible for the injury which would not serve the original purpose of Bivens. And while the Supreme Court recognized that requiting payment for the constitutional harms corporations commit might be the best way to discourage future harms, it refused to expand sanction such suits because Bivens, from its inception, has only been concerned with deterring the unconstitutional conduct of individual officers.

Thus, it is clear that a constitutional tort remedy against private corporations is foreclosed by Malesko. In discussing available alternative remedies, the Supreme Court noted that the proper vehicle for preventing an entity from acting unconstitutionally is injunctive relief. Such relief is available to prevent unconstitutional actions and policies from recurring.

The Plaintiffs "equitable" claim is not for injunctive relief. It does not seek to prevent any ongoing unconstitutional policy or practice. It simply seeks to recover "profits" instead of "damages" under an equitable theory. In contrast to injunctive relief, Plaintiffs' disgorgement claim is clearly more akin to money damages - "the classic form of legal relief." Mertens v. Hewitt Assocs., 508 U.S. 248, 255, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (emphasis added). The "equitable" claim is just a disguised version of their money damages claim and it should be foreclosed for the same reasons set out in Malesko.

Accordingly, and for the reasons set forth above, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion is GRANTED insofar as it seeks to add Sylvia Mathis as a party plaintiff in both actions;

2. Plaintiffs' Motion is DENIED insofar as it seeks to assert claims for unjust enrichment and disgorgement of profits against Defendants in Ranier II.

This the 19th day of February, 2003.

/s/ Joseph H. McKinley, Jr.
Judge, United States District Court

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

No. 5:99-CV-255

[May 15, 2002]

ALPHONSE RAINER, et al.
Plaintiffs,

v.

UNION CARBIDE CORP., et al.
Defendants.

OPINION AND ORDER

This matter[1] is before the Court on the motion [DN118] of

[1] On April 12, 2002, the Court entered an Agreed Order consolidating Rainer v. Union Carbide, No. 99-CV-255 and Rainer v. Richardson, No. 00-CV-220 (which included Dew v. Richardson., No. 00-CV-221). The present motion was filed in Rainer v. Richardson before that reconsolidation, thus the heading of this opinion references both prior cases.

of the Employer-Defendants seeking[2] summary judgment on (1) the Bivens claims, and (2) the remaining state law claims. Both the Rainer Plaintiffs and the Dew Plaintiffs filed responses, to which the Defendants have replied.. The Court has reviewed the parties' filings and the record herein and its rulings are set forth below.

I. The *Bivens* Claims

By memorandum opinion entered on March 15, 2002, the Court dismissed the Bivens claims in all cases then consolidated under Rainer v. Richardson against Defendants General Electric Company, E.I. du Pont de Nemours & Company, NLO, Inc., and NL Industries, Inc. (the "Shipper-Defendants") pursuant to Correctional Services Corp. v. Malesko, 122 S.Ct. 515 (2001). In Malesko, the Supreme Court refused to extend the Bivens remedy to actions against private corporate defendants acting as federal contractors.

The remaining corporate Defendants now seek dismissal of the Bivens claims against them. The Plaintiffs' arguments in opposition were addressed, and rejected, in the Court's March 15 opinion and need not be restated here. No Bivens claims may be maintained against the corporate Defendants, and all such claims will be dismissed.

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[2] The "Employer-Defendants" are Union Carbide Corp. ("Union Carbide"), Lockheed Martin Corp., Lockheed Martin Energy Systems, Inc., Lockheed Martin Utility Services, Inc. (collectively "Lockheed Martin"), Martin Marietta Corp., Martin Marietta Energy Systems, Inc., and Martin Marietta Utility Services, Inc. (collectively "Martin Marietta"). In addition, certain Plaintiffs who began working at the PGDP after Union Carbide ceased operating the plant in 1984 also bring claims against Union Carbide outside of any employment relationship.

II. The State Law Claims

The Defendants' motion also seeks dismissal of some or all of the remaining state law claims in Rainer v. Richardson and Dew v. Richardson.[3] By memorandum opinion entered on March 30, 2001 in Rainer v. Union Carbide, the Court held that all state law claims asserted against PGDP employers by their employees are barred by the exclusive remedy provision of the Kentucky Workers' Compensation Act, K.R.S. 342.690(1).[4] The Court also held that state law claims asserted against Union Carbide by later employees (who were never employed by Union Carbide) were not. Those rulings apply with equal force here.

No claims may be maintained by employees against their employers. However, the state law claims against Union Carbide asserted by those plaintiffs who were not employed by Union Carbide survive. Further, the Plaintiffs represented

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[3] The present motion is procedurally awkward in that it was filed prior to the recent consolidation of Rainer v. Union Carbide, Rainer v. Richardson,. and Dew v. Richardson The Rainer Plaintiffs advised the Court at conference that if the Bivens claims against the corporate defendants were dismissed, they would not be pursuing Bivens claims against individuals; and that there would be little difference between the remaining state law claims in Rainer v. Richardson and those in Rainer v. Union Carbide. There are a few state law claims asserted in Rainer v. Richardson (e.g., fraud, deceit, misrepresentation) that currently have not been plead in Rainer v. Union Carbide.

[4] The Dew Plaintiffs apparently wish to revisit that holding, even though a summary judgment response is a less than ideal forum for doing so. Nevertheless, and more importantly, there is nothing in the Dew Plaintiffs' arguments even remotely warranting further discussion.

at conference on March 21, 2002, that the claims of the household members are direct claims against the PGDP *operators* rather than derivative (i.e., consortium) claims against their spouses' *employers*.[5] These claims seek damages for injuries resulting from contaminants being brought into their homes by family members, and also survive.

III. Conclusion and Order

Accordingly, and for the reasons set forth above, IT IS HEREBY ORDERED that the motion for summary judgment [DN 118] of Defendants Union Carbide Corp., Lockheed Martin Corp., Lockheed Martin Energy Systems, Inc., Lockheed Martin Utility Services, Inc., Martin Marietta Corp., Martin Marietta Energy Systems, Inc., and Martin Marietta Utility Services, Inc. is GRANTED in part, as follows: (1) all Bivens claims against corporate defendants are dismissed as barred by Malesko; (2) all state law claims asserted by PGDP employees against their employers are dismissed pursuant to the Court's March 30, 2001 memorandum opinion on preliminary legal issues; and (3) all other state law claims not otherwise dismissed by this or any previous ruling in Rainer v. Union Carbide or Rainer v. Richardson remain.

This the15th day of May, 2002.

/s/ Joseph H. McKinley, Jr.
Judge, United States District Court

cc: counsel of record

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[5] The Plaintiffs' responses were filed prior to that conference.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

No. 5:99-CV-255

[March 15, 2002]

ALPHONSE RAINER, et al.	)
Plaintiffs,	)
	)
v.	)
	)
UNION CARBIDE CORP., et al.	)
Defendants.	)
	)
	)

MEMORANDUM OPINION AND ORDER ON MOTIONS TO DISMISS *BIVENS* CLAIMS

This matter is before the Court on motions [DNs 72, 73] of Defendants GE, Du Pont, and NL/NLO, seeking dismissal of the Bivens claims in this consolidated action.[1] Two sets of

[1] The joint motion of Du Pont and NL/NLO [DN 73] also sought dismissal of certain state law claims made by the Dew and Shaffer Plaintiffs. A number of those issues were addressed by the memorandum opinion entered on February 21, 2002. The remaining issue in that joint motion, the viability of the Shaffer

Plaintiffs bringing these claims have filed responses[2], and the Defendants have jointly replied. The Defendants also filed supplemental authority, to which the Plaintiffs were granted leave to respond. The Court has reviewed the parties' filings and the record herein and, for the reasons set forth below, the motions will be granted.

I. BACKGROUND

The Rainer, Dew, and Shaffer Plaintiffs bring claims pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging that Defendants General Electric Company ("GE") E.I. du Pont de Nemours & Company ("DuPont"), and NLO, Inc. and NL Industries, Inc. ("NLO") are federal contractors who violated the Plaintiffs' constitutional rights. In briefs filed in 2001, those corporate defendants argued that dismissal was warranted on a number of grounds. At that time, the law in the Sixth Circuit was that "a Bivens claim can be brought against a private corporation that engages in federal action."

Plaintiffs' tort claims against these Defendants in the absence of any manifestation of physical injury, was mooted by the settlement order entered on March 8, 2002.

[2] Bivens claims are asserted by, and the Defendants' motions are directed to , the plaintiffs in Rainer v. Richardson, No. 00-CV-220 (the "Rainer Plaintiffs"), the lead case in this consolidated action, in Dew v. Richardson, No. 00-CV-221 (the "Dew Plaintiffs") and in Shaffer v. Atomic Energy Commission, NO. 00-CV-307 (the "Shaffer Plaintiffs), two of the cases consolidated herein. The Rainer and Dew Plaintiffs filed responses to these motions. The two remaining Shaffer Plaintiffs who have since dismissed their claims against Du Pont and NL/NLO, but not GE -- did not file a response.

Hammons v. Norfolk Sourthern Corp., 156 F.3d 701, 708 (6th Cir. 1998). At least one other circuit held otherwise. See Kauffman v. Anglo-American School of Sofia, 28 F.3d 1223, 1227 (D.C. Cir. 1994).

The Defendants' memoranda noted that the split would likely be addressed in a case in which the Supreme Court had recently granted certiorari. (See GE Mem., p. 1; Dupont/NLO Mem., p. 16 n.76.) The Supreme Court did in fact address the issue, and its ruling is fatal to the Plaintiffs' claims here. Bivens claims may not be brought against private corporations under any circumstances. Correctional Services Corp. v. Malesko, 122 S. Ct. 515 (2001).[3]

II. Discussion

In Bivens, the Supreme Court found an implied cause of action against individual federal agents who allegedly violated in plaintff's Fourth Amendment right to freedom from unreasonable searches and seizures. Bivens, 403 U.S. at 397. In permitting such claims, Bivens sought both to defer federal agents from committing constitutional violations and to provide a just remedy for constitutional harms. See id at 407-10 (Harlan, J., concurring).

In Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994), the Supreme Court was asked "to expand the category of defendants against whom Bivens-type actions may be brought to include not only federal *agents*, but federal *agencies* as well." Id. At 484 (emphasis in original). It

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[3] Malesko was decided on November 27, 2001, shortly after the final reply brief on these motions was filed. On December 6, 2001, the Defendants jointly filed "supplemental authority" by providing the Malesko opinion to this Court.

declined to do so, finding among other things, that "the purpose of Bivens is to deter *the officer*" from violating constitutional rights, even though that officer might be shielded from liability by qualified immunity. See id. at 485 (emphasis in original). The Court reasoned that if plaintiffs were permitted to sue the agency– in addition to the individual agent who allegedly committed the constitutional violation– the would bypass qualified immunity by bringing their claims against only the agency and "the deterrent effects of the Bivens remedy would be lost." See id.

The question left unanswered in Meyer was whether Bivens claims could be brought against private entities acting as agents of the federal government. The D.C. Circuit Court of Appeals, applying the analysis and reasoning of Meyer, found that could not.[4] Kauffman, 28 F.3d at 1226-28. The Sixth Circuit, believing that Meyer should not apply to private corporations, reached the opposite conclusion. Hammons, 156 F.3d at 705-706. The Sixth Circuit placed less emphasis on Bivens' deterrent effect, believing that "the primary goal of Bivens was to provide a remedy for victims of constitutional violations by federal agents[.]" Id. at 706.

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[4] The Kauffman court reasoned that private entities may not be sued under Bivens because; (1) a private entity, even if it were found to be a federal actor, has a more tenuous link to federal authority than a federal agency (which, under Meyer, can not be subjected to Bivens claims); (2) as in Meyer, Bivens' goal of deterring individuals from committing constitutional violations would be weakened by allowing suits against the entity ; (3) the potential financial drain on the federal government was a "special factor counseling hesitation", and (4) the Supreme Court had clearly demonstrated its reluctance to extend the Bivens remedy. See Kauffman, 28 F.3d at 359-361.

The split was addressed in Malesko, 122 S.Ct. 515 (2001). Like the Sixth Circuit in Hammons, the Second Circuit had "reasoned that private critics...should be liable under Bivens to 'accomplish the...important Bivens goal of providing a remedy for constitutional violations.'" Id. At 518 (quoting Malesko v. Correctional Services Corp., 229 F.3d 374, 380 (2d Cir. 2000)).

Relying extensively on Meyer, Malesko continued the Court's "consistent[] refus[al] to extend Bivens liability to any new context or new category of defendants."[5] See id. at 520. Whatever Bivens' original goals may have been, the Malesko Court made clear that, in its view, the sole purpose for permitting Bivens claims is to deter unconstitutional conduct by individual federal officers. See id. At 521-22 ("The purpose of Bivens is to deter individual federal officers from committing constitutional violations."; Bivens[] is concerned solely with deterring the unconstitutional acts of individual officers"; Bivens from its inception had been based...on the deterrence of individual officers who commit unconstitutional acts."); see also Meyer, 510 U.S. at 485 ("the purpose of Bivens is to deter *the officer*"). Thus Malesko absolutely and unequivocally "forecloses the extension of Bivens to private entities" such as the corporate defendants here. See Malesko, 122 S.Ct. At 518 n.2.

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[5] The four Justice dissent in Malesko found it "incongruous and confusing" that a plaintiff may sue a corporate state actor for constitutional violations under 42 U.S.C. § 1983,, yet that same plaintiff is not permitted to sue a corprate federal actor for constitutional violations under the closely analogous provisions of Bivens. See Malesko, 122 S.Ct. At 527 (Stevens, Souter, Breyer and Ginsburg. JJ., dissenting). The Sixth Circuit had raised similar concerns in Hammons. Hammons, 156 F.3d at 707-708.

The Plaintiffs' arguments in their supplemental response rest on two erroneous contentions: that Malesko's holding is limited to cases where the plaintiff has no alternative remedy; and that "Malesko did not limit the availability of injunctive or equitable relief for constitutional violations." (Pls. Supp. Resp., p.2 (citing Malesko, 121 S.Ct. At 523).) The first contention is simply wrong. There is nothing in Malesko to suggest that its holding applies only to certain facts. Bivens claims against corporate defendants are foreclosed by Malesko, not merely limited by it.

The Plaintiffs' second contention involves a far too expansive reading of Malesko. The issue of whether the Plaintiffs may seek disgorgement of profits and/or prejudgment interest under any theory of recovery is not before the Court at this time. It is beyond dispute, however, that these damages are not available against corporate defendants for alleged Bivens violations, The motions to dismiss will be granted.

III. Conclusion and Order

Accordingly, and for the reasons set forth above, IT IS HEREBY ORDERED that the motion of Defendant GE [DN 72] and joint motion of Defendants DuPont and NLO [DN 73] to dismiss the Bivens claims are GRANTED. The Bivens claims against the corporate defendants are dismissed.

This 15th day of March, 2002.

/s/ Joseph H. McKinley, Jr.
Judge, United States District Court

cc: counsel of record

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CIVIL ACTION NO. 5:99-CV-255-M

[Filed March 30, 2001]

ALPHONSE RAINER, et al.	)
	)
PLAINTIFFS	)
	)
v.	)
	)
UNION CARBIDE CORP., et al.	)
	)
DEFENDANTS.	)
	)

MEMORANDUM OPINION ON PRELIMINARY LEGAL ISSUES

This matter is before the Court on dispositive motions [DNs 65 & 66] filed by certain of the Defendants, pursuant to the Court's order entered on December 30, 1999, related to preliminary legal issues. Specifically at issue here are: (1) whether the Class I or Class II Plaintiffs' claims are barred by the exclusive remedy provision of the Kentucky Workers' Compensation Act and/or (2) whether any or all of the

Plaintiffs' claims are barred by applicable statutes of limitations. The Plaintiffs have filed a response, to which the Defendants have replied. The Court has reviewed the parties' filings and the record herein and its rulings are set forth below.

I. BACKGROUND

This case involves tort claims arising from the Plaintiffs' exposure to radioactive and other toxic substances while employed at the Paducah Gaseous Diffusion Plant ("PGDP"), a uranium enrichment facility located near Paducah, Kentucky. Although the PGDP is owned by the federal government, three successive private corporations (and their corporate successors) have operated the plant under government contract during the relevant time period here: Union Carbide[1] operated the facility from its inception in 1952 until 1984; Martin Marietta Energy[2] was the operator from 1984 to 1993; and Martin Marietta Utility/Lockheed Martin

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[1] Union Carbide Corporation, formerly known as Union Carbide and Carbon Corporation.

[2] Martin Marietta Energy Systems Inc.

Utility[3] operated the facility from 1993 until 1999.[4] These government subcontractors, in their capacity as employers, are collectively referred to herein as the Employer-Defendants. Certain plaintiffs also bring claims against General Electric,[5] which provided uranium to the facility but was not an employer of any of those plaintiffs.[6]

This action involves four classes of plaintiffs. Class I consists of current and former employees of the operators of the PGDP who bring common law claims against their employers for injuries received in the course of their employment. Class II consists of employees who began working at the facility after 1984; thus, none of the Class II Plaintiffs were ever employed by Union Carbide or were otherwise exposed to the toxic substances at the facility during

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[3] Martin Marietta Utility Services, Inc., and its corporate successor, Lockheed Martin Utility Services, Inc., operated the facility from 1993 until 1999. Martin Marietta Energy Systems, Inc., and its corporate successor, Lockheed Martin Energy Systems, Inc., also performed environmental services under contract during that period. Martin Marietta Utility Services, Inc. and Martin Marietta Energy Systems, Inc. are subsidiaries of Martin Marietta Corporation; Lockheed Martin Utility Services, Inc. and Lockheed Martin Energy Systems, Inc. are subsidiaries of Lockheed Martin Corporation.

[4] The facility is currently operated by U.S. Enrichment Corporation, a government-chartered private company. *See* Pls.' Resp., Ex. 13.

[5] General Electric Company.

[6] In addition, certain other plaintiffs, who began work after the Union Carbide contract had ended, assert claims against Union Carbide also outside of any employment relationship.

the time that Union Carbide operated the plant. These plaintiffs assert claims against Union Carbide only, outside of any employment relationship. Class III consists of employees who worked at the plant between 1952-1998 and who bring claims only against General Electric related to GE's shipments of uranium feedstock to the PGDP. These claims also arise outside of an employment relationship. Finally, Class IV consists of members of the households of those plaintiffs in the first three classes.

The PGDP was designed shortly after World War II, when the country was facing the conflict in Korea and the Cold War. Its sole function is to create enriched uranium-it is not a nuclear reactor, nuclear accelerator, or nuclear weapons test site. During normal operation the plant takes unprocessed uranium and converts it into a gaseous form. That gas is then injected through a series of membranes, and the resulting end product contains a higher percentage of uranium-235 than did the original feedstock. Uranium-235 is the essential ingredient of most nuclear fuel and certain nuclear weapons.

Because uranium ore is scarce, in 1953, shortly after its inception, the PGDP began to enrich not only mined uranium but also uranium left over from nuclear reactors which made plutonium for nuclear weapons. Much of this recycled reactor fuel was then processed by Defendant General Electric to extract the uranium and sent to the PGDP to be enriched as any other uranium. This used uranium commonly arrived in the form of a black powder from the Hanford Nuclear Reservation in Washington state. Over 100,000 metric tons of the recycled uranium fuel was shipped to and processed by the PGDP between 1953-64 and 1969-74.

What the Plaintiffs allege that they were never told, and that the Defendants actively concealed from them, was that

the recycled reactor fuel enriched at the PGDP contained not only uranium, but also technetium and transuranics-extremely toxic byproducts of the plutonium making process. Natural uranium, though not highly radioactive, is both chemically and radiologically toxic when inside the human body. Transurauics are much more dangerous than uranium. Ounce for ounce, transuranics can be up to one million times more radioactive; and, while uranium can cause kidney damage, transurauics attack bones and bone marrow. Varying levels of contamination from these substances remain in and around the facility to this day.

On June 1, 1999, a *qui tam* action[7] was filed by several PGDP employees alleging that the Employer-Defendants had defrauded the federal government by: (1) maintaining a fraudulent health physics program at the PGDP; (2) dumping vast quantities of contaminated waste onto federal, state, and private lands; (3) misrepresenting the presence or levels of toxic substances at the PGDP in order to receive federal environmental performance payments; and (4) allowing workers to handle contaminated metals and place those contaminated metals into the marketplace. Although the *qui tam* suit was filed under seal, *The Washington Post* obtained it and on August 8, 1999 began a series of investigative articles concerning the allegations. The *Post's* investigation centered on the presence of transurauics at the facility, the employees' lack of knowledge of the transurauics and their dangers, and inadequate or nonexistent safety measures. The

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[7] The *qui tam* action is styled United States of America ex rel. Natural Resources Defense, council, Inc., et al. v. Lockheed Martin Corp., et al., No. 5:99-CV-00170, Western District of Kentucky, Paducah Division.

United States Department of Energy also began an investigation. The Plaintiffs state that:

> In sum, by the close of the year 2000, a facility represented by the defendants to have fully complied for decades with worker health physics and radiological protection laws was now known, thanks to disclosures beginning in 1999, to have been undoubtedly the most radiologically dangerous and contaminated facility in the nation. The extent of the lies and deception perpetrated against the PGDP workforce by the defendants to induce their continued work in this known radioactive cesspool rivals anything seen in America in the nuclear age.

Pls.' Resp., p. 24.

This action was filed on September 3, 1999. The Class I Plaintiffs assert claims under theories of battery, fraud, outrage, and unjust enrichment. The Class II Plaintiffs assert claims under theories of battery, outrage, negligence, and ultrahazardous activity. Both Class III and Class IV Plaintiffs assert claims under theories of outrage, negligence, and ultrahazardous activity. None of the Plaintiffs presently manifest any symptoms of physical injury or disease. All of the classes seek damages for emotional distress, including fear of disease, increased risk of disease, and medical monitoring. In addition, the Class I Plaintiffs seek recovery (disgorgement) of the Employer-Defendants' unjust enrichment.

II. DISCUSSION

Pursuant to the order entered herein on December 30, 1999, presently before the Court are dispositive motions

addressing two primary issues: (A) the application and effect of the exclusive remedy provision of the Kentucky Workers' Compensation Act; and (B) the effect of any applicable statutes of limitations.

A. Whether the Kentucky Workers' Compensation Act Provides the Exclusive Remedy to the Class I or Class II Plaintiffs

The Employer-Defendants contend that the Plaintiffs' claims are barred as a matter of law by the exclusive remedy provision of the Kentucky Workers' Compensation Act ("KWCA" or "Act"), K.R.S. 342.690(1). The KWCA provides the exclusive remedy for most on-the-job injuries. However, there are three general exceptions to that exclusivity provision. An injured worker in Kentucky may forego his rights under the Act and bring an action at law where either: (1) the injury was the result of the employer's deliberate intention to injure the employee, Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25 (Ky. 1955); (2) the injury was the result of willful and unprovoked physical aggression by a fellow employee, Zurich Insurance Co. v. Mitchell, 712 S.W.2d 340 (Ky. 1986); or (3) the injury to a subsidiary corporation's employee was the result of the independent reckless or negligent conduct of the parent corporation, Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979). The primary issue presented here is whether the Class I Plaintiffs can demonstrate that their injuries were received "through the deliberate intention of [their] employer to produce such injury." K.R.S. 342.610(4). If so, there is no dispute but that they may properly bring their action at law in lieu of accepting any no-fault workers' compensation benefits. See id.

The Employer-Defendants contend that the Class I Plaintiffs have presented no evidence that the Employer-Defendants acted with the specific intent to injure those plaintiffs, and that they are therefore entitled to dismissal of those claims as a matter of law. Defendant Union Carbide further contends that, as a former government subcontractor, it was an "employee" under the KWCA and therefore entitled to invoke the exclusive remedy provisions to bar the Class II Plaintiffs claims, even though it never had any employment relationship with those plaintiffs.

The Plaintiffs raise four primary arguments against dismissal on these grounds; they claim: (1) that the "deliberate intent to produce injury" standard is satisfied by conduct which is "substantially certain" to cause injury, or which constitutes an intentional tort; (2) that the tort of outrage can not be excluded by the KWCA because it is not compensable under the KWCA; (3) that to bar the claims under the exclusive remedy and presumptive consent provisions of the KWCA on these facts would violate rights secured by sections 14 and 54 of the Kentucky Constitution; and (4) that Defendant Union Carbide is not entitled to rely on the exclusive remedy provisions of the Act to bar the Class II Plaintiffs' claims.

1. The "Deliberate Intent to Produce Injury" Standard

Generally, the Kentucky Workers' Compensation Act provides the exclusive remedy against an employer for injuries received by an employee in the course of employment by providing that:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all

> other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

K.R.S. 342.690(1). However, an injured employee may elect to seek recovery in tort against the employer and forego the workers' compensation benefits where the employee demonstrates that the employer deliberately intended to cause the injury:

> If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent as herein defined shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any mount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law. If a suit is brought under this subsection, all right to compensation under this chapter shall thereby be waived as to all persons. If a claim is made for the payment of compensation or any other benefit provided by this chapter, all rights to sue the employer for damages on account of such injury or death shall be waived as to all persons.

K.R.S. 342.610(4).

Although virtually every state with a workers' compensation exclusive remedy provision also has some form of intent-based tort exception, there are only four reported cases[8] specifically interpreting or applying Kentucky's "deliberate intention" exception.[9] The Kentucky Supreme Court first addressed the exception in Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25 (Ky. 1955). The plaintiff in Fryman was injured on the job by a metal press. The plaintiff's complaint alleged "that the machinery with which plaintiff worked was defective and dangerous, known to be such by defendant, and defendant permitted plaintiff to work under such dangerous conditions without warning or cautioning plaintiff." Id. at 26. Ruling on a motion to dismiss, the court addressed whether "all the facts set forth in the complaint, taken together, [were] sufficient to constitute the charge of deliberate intention to injure" under the predecessor to K.R.S. 342.610(4).[10] Id. at 26.

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[8] It has recently been noted that the Kentucky' workers' compensation system has "'practically abolished the common law relating to the subject of tortious liability as between the employer and the employee[.]'" Edwards v. Louisville Ladder, 957 S.W.2d 290, 294 (Ky.App. 1997) (quoting Morrison v. Carbide and Carbon Chemicals Corp., 129 S.W.2d 547 (Ky. 1939)).

[9] The term "'deliberate intent' exception" is often used, though would perhaps be clearer, and certainly much more correct, to use the term "'deliberate intent to produce injury' exception."

[10] K.R.S. 342.015(2), the predecessor to K.R.S. 342.610(4), was substantively identical.

The Fryman court stated that "[t]he phrase 'deliberate intention' implies that the employer must have determined to injure the employee." Id. It also noted that "most of the cases, if not all, from the other jurisdictions have interpreted the meaning of the phrase 'deliberate intention' to be that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent." Id. at 27. Thus the first Kentucky court to interpret the exception clearly found that "deliberate intent" under the KWCA was something different than "intent" as used in tort law. Finding the plaintiff's allegations "devoid of any charge that defendant determined to injure plaintiff," the Fryman court deemed the complaint insufficient to bring the claim within the exception. Id. at 26.

In the only other Kentucky state court opinion interpreting and applying the exception, McCray v. Davis H. Elliott Co., 419 S.W.2d 542 CKy. 1967), an apprentice electrician was killed by a high voltage wire. His estate filed a wrongful death complaint alleging that the employer: (1) intentionally directed the decedent to work in an extremely dangerous and hazardous place; (2) knew that the decedent was inexperienced and could not appreciate the dangers; and (3) failed to provide necessary safety equipment. Id. at 543. The *McCray* court held that while such allegations may have constituted wanton and gross negligence, id., they were not sufficient to show deliberate intent, id. at 544.

Two later federal court decisions have applied the KWCA's deliberate intent standard as set forth in *Fryman* and *McCray*. In Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527 (6th Cir. 1999),[11] the plaintiff was killed in an

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[11] A related state court ease, Zurich American Insurance Co. v.

explosion at the Alusuisse plant. An industrial "washing machine" used to clean printing press components had malfunctioned three days earlier. The seal on the main pump broke, causing highly flammable solvent solution to leak from the machine. The machine was shut down and plans were made to remove the pump. Alusuisse, 184 F.3d at 529.

The employer took a number of immediate initial precautions to minimize the possibility that removing the pump-which required welding-would create a fire hazard, namely: completely shutting off the electricity to the machine; draining the solvent from the machine; ventilating the pit beneath the machine to purge accumulated solvent fumes from underneath the machine; leaving the machine door open to purge fumes from the machine itself; and running the floor-level ventilation system to purge fumes from the room. Id.

Additional safety measures were taken before the welding began three days later. Water was put into the pit beneath the machine to prevent sparks from igniting any solvent residue, and welding blankets were placed around the machine. Finally, a "fire watch" crew-which included Brierly-was assembled to carry fire extinguishers and watch for stray

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Brierly, 936 S.W.2d 561 (Ky.1996), offers little guidance on the issues presented here. In Zurich, the Kentucky Supreme Court rejected the argument that the Workers' Compensation Board is required to find "deliberate intent" before a plaintiff can elect to waive his workers' compensation fights and sue at common law. See Zurich, 936 S.W.2d at 562. The opinion in Zurich is helpful here only in that it clearly recognized that whether the employer deliberately intended to cause injury is a question of fact. See id. ("there is simply nothing about the determination of 'deliberate intent' that is so peculiar to Workers' Compensation Law that a circuit judge or jury could not decide the issue").

sparks from the welder. Id. at 529-30. In spite of all these precautions, a spark from the welder ignited solvent fumes inside the machine.[12] The ensuing explosion blew a steel door off of the other side of the machine, striking and killing Brierly. Id. at 530.

The district court granted the defendants' motions for summary judgment, and the Sixth Circuit found that "that the district court, relying on controlling state law, correctly concluded that the plaintiff's allegations [we]re insufficient to meet the specific or deliberate intent exception."[13] Id. at 535. The Alusuisse court expressly noted on several occasions that Brierly's death was caused by an "accident," id. at 529, and that the defendants had taken "many precautions" to avoid the injury, *id.* at 535. The court then repeated the trial court's remark that "if Brierly's death was intended, an explosion such as this seems like a strange, clumsy, and unreliable way to carry it out." Id.

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[12] A device known as an "LEL meter" could have been used to measure the solvent vapor in the area. It was determined after the explosion, however, that each of the persons involved erroneously believed that one of the others had obtained those readings. Alusuisse, 184 F.3d at 530.

[13] Alusuisse also makes clear that, properly plead and supported, deliberate intent is a question of fact, id. at 536 ("we conclude that the plaintiff did not present evidence to the district court from which a reasonable jury could conclude that Alusuisse deliberately intended to cause Brierly's death"), and that reckless or wanton conduct will not suffice, id. (summary judgment would be proper "[e]ven ifAlusulsse's actions were reckless or wanton").

In the most recent opinion, Blanton v. Cooper Industries, Inc., 99 F.Supp.2d 797 (E.D.Ky. 2000), a deceased workers' estate filed suit against his former employer in a Kentucky federal court, claiming that his death from pancreatic cancer resulted from exposure to harmful chemicals at the workplace. Contamination from the employer's plant, which ultimately became a Superfund site, had been the subject of numerous, highly publicized lawsuits beginning as early as 1990. Those suits were consolidated and, after trial, settled in October, 1996, "with payments being made to [those] plaintiffs in November of that same year." The Blanton complaint was filed in October, 1997. Id. at 799.

The complaint "allege[d] that the defendants knew that the chemicals were harmful, knew that they caused cancer, knew that employees would be exposed, but never said anything and never took measures to reduce or alleviate the risk to employees." Id. at 805. The district court granted the defendant's motion for summary judgment, holding that dismissal is proper where the plaintiff "does not produce any evidence that this was done to harm the employees." Id.

The Class I Plaintiffs claims here are strikingly similar to those of the unsuccessful plaintiffs in Blanton. Their claims are summarized as follows:

> [D]efendants caused extremely and illegally high levels of radiation, including uranium, plutonium, and neptunium, to strike and injure Plaintiffs and class members, were aware that illegally high levels of uranium and these contaminants had in fact caused certain injury in these Plaintiffs and class members, ... knew and were aware that the injury caused by exposure to illegally high levels of uranium and to these contaminants would be aggravated and

> exacerbated by additional exposures over time and produce additional injury[,and]... knowingly concealed and failed to disclose the truth about the illegal levels of radiation[.]

Pls.' Resp., p. 45 (quoting First Am. Compl., paras. 25, 35-36) (internal quotations omitted). These allegations do not demonstrate that the Employer-Defendants had the specific and deliberate intent to injure them as required by current Kentucky law.

Recognizing this, the Plaintiffs contend that the "deliberate intention to produce injury" standard should be satisfied in cases where the employer places the employee in a situation where injury is "substantially certain" to occur. The Court's review of the parties' briefs, filings, and its own research, however, reveals three primary factors weighing heavily against the interpretation urged by the Plaintiffs. First, the Kentucky state cases interpreting "deliberate intent," as well as the federal cases applying that standard, do not suggest that a substantial certainty test applies under current Kentucky law. Second, the definition of "deliberate intent to produce injury" as used in the KWCA is much narrower than "intent" in general tort law, where the substantial certainty analysis is proper. And finally, although a few states have either legislatively or judicially adopted the substantial certainty standard for theft intent-based exclusivity exception, none had their genesis in a federal court.

The Plaintiffs contend that "[i]t is well-established that the meaning of the phrase 'deliberate intent' covers those situations where the defendant has deliberately acted in a manner where he knows injury is substantially certain." Pls.' Resp., p. 49. The well-established definition of "intent" in the law of torts considers intended consequences to include not

only those "which the actor desires to bring about," but also those "that are certain or substantially certain to result fyom the act." Vitale, 24 S.W.3d at 657 (citing RESTATEMENT (2D) TORTS § 8A cmt. b). The Plaintiffs' suggestion here, that "the same definition of 'intentional' employed in tort law should be applied in the workers' compensation context," Lantz v. National Semiconductor Corp., 775 P.2d 937, 939 (Utah.App. 1989), has been put forth and rejected in other jurisdictions. See id. at 940.[14]

Support for the Plaintiffs' call for a "substantial certainty" analysis is far from well-established, but it does exist. As previously noted, virtually all states except some form of intentional employer conduct from their workers' compensation system's exclusive remedy provision. Like Kentucky's exception, other states' intent-based exceptions are often found in the workers' compensation acts themselves, see, e.g., Birklid v. Boeing Co., 904 P.2d 278 (Wash. 1995), while others are judicially created, see, e.g., Griffin v. George's, Inc., 589 S.W.2d 24, 27 (Ark. 1979) ("excepts acts committed with an actual, specific and deliberate intent on the part of the employer to injure the employee"); Lantz, 775

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[14] This is in fact the underlying theme of the Plaintiffs' arguments, which routinely interchange the terms "intent" and "deliberate intent."

However, the Plaintiffs are by no means alone in using terms loosely, adding further confusion to the issue. For example, courts often call their state's exception the "intentional tort exception," leading a unwary reader to believe that a plaintiff must only plead and prove an intentional tort, when in fact the exception, like Kentucky's, requires the deliberate intent fo produce the injury. See, e.g., McNees v. Cedar Springs Stamping Co., 457 N.W.2d 68, 68-69 (Mich.App. 1990); Johnson v. Mountaire Farms of Delmarva, Inc., 503 A.2d 708, 711 (Md.App. 1986).

P.2d at 940 (requiring that the employer have "an actual deliberate intent to injure" the employee).

Several state courts have ameliorated the harshness of total exclusion by rejecting the concept of an "intentional tort exception" altogether, finding that intentional acts by an employer are not "accidents" and therefore not covered by the workers' compensation act. See Baker v. Westinghouse Electric Corp., 537 N.E.2d 1271, 1273 (Ind. 1994) (where the "exclusivity provision is expressly limited to personal injury or death arising out of and in the course of employment which occurs 'by accident.'"); Limanowski v. Ashland Oil Co., 655 N.E.2d 1049 (Ill. 1995). Even in those states, however, "nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice[.]" Baker 637 N.E.2d at 1275; Limanowski, 655 N.E.2d 1049 (requiring that the employer specifically intend to injure the plaintiff). At the other extreme, at least one jurisdiction allows no exceptions whatsoever; all workplace injuries, even those specifically and deliberately intended by the employer, must be remedied through the workers' compensation system. See Building and Construction Dept. v. Rockwell International Corp., 7 F.3d 1487, 1495 (10th Cir. 1993) ("No such exception has been recognized by the Colorado courts, and the wording of the Colorado statute suggests no intent on the part of the Colorado legislature to create such an exception.").

A few states have adopted the standard urged by the Plaintiffs. One noted commentator lists five states as having adopted the substantial certainty doctrine-Michigan, North Carol/ha, Louisiana, Ohio, and West Virginia. See Rafferty v. Hartman Walsh Painting Co., 760 A.2d 157, 161 (J)el. 2000)(quoting LARSON, WORKERS' COMPENSATION LAW § 103.04). However, at least three of those states had judicially

expanded their intent-based exceptions to include substantially certain injuries, only to have those expansions subsequently limited by their state legislatures. See McNees v. Cedar Springs Stamping Co., 457 N.W.2d 68 (Mich. App. 1990) (substantial certainty test set forth in Beauchamp v. Dow Chemical Co., 398 N.W.2d 882 (Mich. 1986) limited by subsequent retroactive statute requiting that the employer willfully disregard actual knowledge that an injury is certain to occur); see also Birklid, 904 P.2d at 285 n. 14 (noting that "[t]he legislatures of Ohio and West Virginia reacted to the judicial establishment of the 'substantial certainty' test by enacting legislation that more narrowly defined and limited the scope of the exceptions").

At least one state has construed "deliberate intent" significantly more broadly than Kentucky and the majority of deliberate intent jurisdictions, Mandolidis v. Elkins Industries, 246 S.E.2d 907 (W.Va. 1978) ("deliberate intent" is satisfied where employer's conduct constitutes either an intentional tort, willful, wanton, and reckless misconduct, or produces an injury that is substantially certain to occur), while another has expressly rejected the substantial certainty doctrine but nonetheless adopted a standard that the Plaintiffs here might satisfy, Birklid, 904 P.2d at 285 ("the phrase 'deliberate intention'... means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge").

The Court's review of other states' intent-based exceptions is instructive on two compelling points. First, it makes absolutely clear that "intent" in tort law and "deliberate intent" in workers' compensation law are not synonymous. Second, and perhaps most importantly, is that this Court has not found a single case where a federal court has judicially expanded a state's intent-based exception, in the absence of

express language of the workers' compensation act, to include injuries which were substantially certain to occur.

There can be little doubt but that the "intent" required for liability under Kentucky tort law is broader than the "deliberate intent to produce injury" required to invoke the exception to the KWCA. Under the Kentucky common law of torts a Plaintiff can prove intent without showing that the defendant intended to cause any injury. See Vitale v. Henchey, 24 S.W.3d 651, 657-58 (Ky. 2000). However, unless the Plaintiff can show his employer purposefully acted with the desire to do harm, the KWCA provides the exclusive remedy. K.R.S. 342.690(1); Fryman, 277 S.W.2d at 27; see also, e.g., Suarez v. Dickmont Plastics Corp., 698 A.2d 838, 852 (Conn. 1997) ("intent, however, is broader than a desire to bring about the physical results. 'To bypass the exclusivity of the act, the intentional ... conduct alleged must have been designed to cause the injury that resulted.'"); Johnson v. Mountaire Farms of Delmarva, Inc., 503 A.2d 708, 711 (Md.App. 1986) ("intent is broader than a desire or purpose to bring about physical results").

The Plaintiffs contend that "the reason why [these] defendants intentionally subjected their workers to abnormally dangerous levels of transuranics is immaterial. What matters is that [these] defendants knew their workers were so exposed, and deliberately intended that they continue to be exposed." Pls.' Resp., p. 48. The Court disagrees. The "reason why [these] defendants intentionally subjected their workers to abnormally dangerous levels of transuranics" is not only material, it is dispositive.[15] Unless it can be shown that the

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[15] Much of the Plaintiffs arguments here rest on semantics. The Court agrees that the underlying *motive* for intending the injuries

Employer-Defendants intentionally subjected their workers to abnormally dangerous levels of transuranics because they wanted them to be injured, the KWCA provides the exclusive remedy.

The Plaintiffs contention is simply that this case differs because the dangers were much greater, and the possible injuries much more severe. This is by no means an untenable position. Nevertheless, those considerations do not factor into the analysis under the standard provided by the Kentucky legislature as interpreted by Kentucky state and federal courts. There must be evidence of the employer's specific and deliberate intent to produce the injury, and the Plaintiffs have cited none.

Federal courts are traditionally and rightfully reluctant to substitute their judgment in the face of clear and unambiguous expressions by a state legislature. If the standard for maintaining an action at law for injuries suffered by Kentucky employees should be modified, it is a matter for consideration by the Kentucky legislature and courts. Both the Kentucky General Assembly and the Kentucky Supreme Court have spoken. Without a showing that the Employer-Defendants specifically and deliberately intended to produce the Plaintiffs' injuries, there can be no action in this Court.

The allegations in the Plaintiffs complaint, even if true, are insufficient to invoke the exception. All claims arising from those injuries are therefore barred by the exclusive remedy provision of the Kentucky Workers' Compensation

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(whether it be financial gain, animus, or any other reason) is immaterial. The Plaintiffs are only required to demonstrate that the Employer-Defendants specifically intended to injure them.

Act. The Employer-Defendants' motion for summary judgment will be granted.

2. Outrage Under the KWCA

The Class I Plaintiffs also contend that, even ff their claims do not satisfy the deliberate intention exception, their outrage[16] claim is not barred. They assert two related theories in this regard: (1) that a claim for outrage on these facts falls outside the KWCA's exclusive remedy provision, *see* Pls.' Resp., pp. 54-56; or alternatively (2) that because outrage is not a compensable injury under the KWCA, the KWCA can not be the exclusive remedy for those claims, *see* Pls.' Resp., pp. 65-67. Neither argument is correct under Kentucky law.

The Plaintiffs first contend that in Brewer v. Hillard, 15 S.W.3d 1 (Ky.App. 1999), the Kentucky Court of Appeals "held that intentional infliction of emotional distress constitutes a tort that falls outside of the KWCA's exclusivity provision." Pls.' Resp., p. 54. Brewer contain: no such holding. Rather, Brewer held that "the exclusivity provisions of K.R.S. 342.690(1) [we]re not applicable to Brewer," a fellow employee. Id. at 9.

The Brewer court expressly noted that *the plaintiff was* arguing "that the tort of outrage has been accepted as an exception to the exclusivity provisions of K.R.S. 342.690." Id. at 8. Distinguishing the cases cited by the parties, the court instead relied on the fellow servant exception to the KWCA, also found in K.R.S. 342.690, in conjunction with K.R.S. 342.700, which allows actions at law against third

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[16] Also commonly referred to as intentional infliction of emotional distress.

parties who may be liable for an employee's injuries. See id. at 8-9. The Brewer court found the case analogous to an earlier appellate court decision which had "'no problem with including within the definition of a third party a fellow employee who fails to fall within the immunity set forth under K.R.S. 342.690." Id. at 9 (quoting Russell v. Able, 931 S.W.2d 460, 462-63 (Ky.App. 1996)). Inasmuch as the Plaintiffs' outrage claim here involves no allegations against fellow employees or third parties, Brewer does not apply.

Nor does Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994) add any support to the Plaintiffs' theory. That opinion does not in any way address the KWCA, much less its exclusive remedy provision. A reading of Bailey suggests an obvious reason why these matters were never addressed--the defendant was not the plaintiff's employer. The plaintiff in Bailey was "working for his wife's construction company," removing asbestos from a building "owned by the defendant Capital Holding[.]" Id. at 189.

The Plaintiffs' second argument, that the KWCA can not provide the "exclusive" remedy for an outrage claim because outrage is not a compensable injury under the KWCA, has been soundly rejected by the Kentucky Supreme Court. When an employer's liability to an employee is governed by the exclusive remedy provision, "[t]here is no other remedy available." Shamrock Coal Co. v. Maricle, 5 S.W.3d 130, 134 (Ky. 1999). Merely because "a remedy for a work-related injury is unavailable under the Workers' Compensation Act does not authorize bringing a civil action for damages in circuit court." Id. (citing Davis v. Solomon, 276 S.W.2d 674, 676 (1955)); see also Zurich Insurance Co. v. Mitchell, 712 S.W.2d 340, 342 (Ky. 1987) ("The fact that the act does not provide for pain and suffering is also no basis upon which a cause of action may lie.").

The Court is unmoved by the opinion of the Texas Supreme Court, interpreting Texas law and the Texas Workers' Compensation Act, and applying them to wholly dissimilar facts. GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605 (Tex. 1999) (outrage action based on "constant humiliating and abusive behavior of[a] supervisor," where only "mental trauma," without physical contact, was alleged). This argument must also fail.

For the reasons set forth above, the Court is of the opinion that the Plaintiffs outrage claim is not excepted from the exclusive remedy provision of the KWCA.

3. The Constitutionality of the KWCA 's "Deliberate Intent" and "Implied Consent" Provisions

The Plaintiffs also argue that to bar their claims under the KWCA would violate sections 14 and 54 of the Kentucky Constitution. While phrased by the Plaintiffs in a number of different ways, their argument here is that it is unreasonable to imply their consent to waive common law rights against their employers if they are required to demonstrate that their employers had the specific and deliberate intent to cause their injuries-the standard for the "deliberate intent" exception as it has consistently been interpreted by the Kentucky courts. The only way the exception can pass constitutional muster, the Plaintiffs claim, is to interpret "deliberate intent to produce injury" "as to include the "substantial certainty" test discussed above. The Court can not agree.

Section 14 of the Kentucky Constitution provides that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." KY CONST. § 14.

Further, section 54 provides that "[t]he General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." Id. § 54.

> [The] Kentucky Constitution, §§ 14, 54, and 241, preserve to all persons, including the employee, the common law remedy in tort against a party at fault, except where the employee has made a voluntary election to waive such constitutional rights, express or implied. The foundation for declaring workers' compensation constitutional in Kentucky is built on recognition of this principle.

M.J. Daly Co. v. Varney, 695 S.W.2d 400, 403 (Ky. 1985).

Constitutional attacks on the KWCA and its implied consent provision are "not new." See Wells v. Jefferson Co., 255 S.W.2d 462 (Ky. 1953); Mullin v. Manning Coal Corp., 938 S.W.2d 260 (Ky. 1997), cert. denied, 521 U.S. 1119 (1997); Shamrock Coal Co., Inc. v. Maricle, 5 S.W.3d 130 (Ky. 1999); McLain v. Dana Corp., 16 S.W.3d 320 (Ky.App. 2000). In fact, the original workers' compensation act adopted by the Kentucky legislature did offend the jural rights doctrine, because participation in the system was mandatory. *Wells*, 255 S.W.2d at 462-63 (citing Kentucky State Journal Co. v. Workmen's Compensation Board, 170 S.W. 437 (Ky. 1914), modified after reh'g, 172 S.W. 674 (1915)). The Kentucky Supreme Court in State Journal suggested that the constitutional deficiency might be avoided if the Act were be amended to provide that an employee must signify his acceptance of the terms of the KWCA by some affirmative act. Wells, 255 S.W.2d at 463. The *State Journal* court did not believe that the employee's silence could constitute such acceptance. Id.

"[W]hen the Legislature re-enacted the Worker's Compensation Act in 1916, it provided that coverage under the Act is not compulsory, but rather allows a worker to reject participation in the no-fault scheme and to maintain his fight to seek common law remedies." McLain, 16 S.W.3d at 324. The "opt-out" or "implied consent" provision of the Act, added in 1952, provides that:

> Where an employer is subject to this chapter, then every employee of that employer, as a part of his conlzact of hiring... shall be deemed to have accepted all the provisions of this chapter and shall be bound thereby unless he shall have filed, prior to the injury or incurrence of occupational disease, written notice to the contrary with the employer; and the acceptance shall include all of the provisions of this chapter with respect to traumatic personal injury, silicosis, and any other occupational disease. However, before an employee's written notice of rejection shall be considered effective, the employer shall file the employee's notice of rejection' with the Department of Workers' Claims.

K.R.S. 342.395(1).

In 1953, the Kentucky Supreme Court upheld the constitutionality of that amendment. It rejected the *State Journal* court's belief that an employee's silence could not be construed as acceptance, finding that employees could impliedly consent to their participation in the system. See Wells, 255 S.W.2d at 463. The Wells court reasoned that it was sufficient that a Kentucky employee could affirmatively *reject* participation in the workers' compensation system-it is not constitutionally required that he affirmatively *accept* it. See id.

In Faun v. McGuffey, 534 S.W.2d 770 (Ky. 1975), the Kentucky Supreme Court upheld the constitutionality of the implied consent theory found in the Kentucky Motor Vehicle Reparations Act. The Plaintiffs here cite to, and emphasize, the following language from that opinion:

> At the outset, the implied-consent theory must be recognized for what it is. As in the instance of contracts implied in law vis-a-vis contracts implied in fact, it necessarily stands on fiction rather than fact. But it is not thereby degraded or denigrated, because the venerated fictions of the law have been deliberately created to achieve what is right. The law simply declares that as done which ought to have been done. If implied-consent laws (or, for that matter, any other laws) had to depend on actual notice they could not exist. *It seems to us, therefore, that the proper test of such a law is whether under all the circumstances, considering the public purpose sought to be accomplished and the nature and extent of detriment to the individual, it is reasonable for it to presume a consent where none exists in fact.*

Id. at 776 (emphasis added); see also McLain, 16 S.W.3d at 325.

The Plaintiffs apparently believe that the emphasized language above is an instruction to the courts to ascertain, in every individual case, whether it is reasonable to imply consent based on the facts of the case. They contend that they would not have consented to waive their common law remedies had they known of the dangers at the PGDP-in other words, in the absence of the Defendants' fraudulent representations that the workplace was safe. They suggest that because no reasonable person would consent to be injured by

someone who knows that it is "substantially certain" that the injury will occur, such consent can not be constitutionally imputed to them. This argument, however compelling, is not supported by existing Kentucky law. As was noted in McGuffey, "no implied consent law could survive" if it the right waived were required to be waived "knowing[ly], voluntar[ily], and intelligent[ly]." McGuffey, 534 S.W.2d at 776.

To hold that every individual plaintiff is entitled to demonstrate whether implied consent is reasonable under his circumstances would, in effect, totally negate the purpose behind having the implied consent doctrine in the first place. The issue is not whether a particular individual should be deemed to have consented based on the facts of his case. The issue is whether it is reasonable for the law to presume the consent of the group affected by the legislation-such as Kentucky workers or Kentucky motor vehicle operators-considering all the circumstances behind the law's enactment.

> The original intent of the Act was to provide both employers and employees with a set of reliable and concrete rules to be followed when a worker suffered a job-related injury. Employees gave up their constitutional right to seek redress for their injuries in court in exchange for a certainty of compensation. Employers gave up the possibility of avoiding payment on some claims altogether in exchange fora definite cap on their liability. This quid pro quo is the basis for the exclusive remedy provision of the Act.

Shamrock Coal Co., Inc. v. Maricle, 5 S.W.3d 130, 135 (Ky. 1999) (Graves, J., dissenting).

The result of the compromise that became the Kentucky Workers' Compensation Act is that, necessarily, there will be individuals who would have fared better had they not been covered by the Act. For reasons of expedience and certainty, however, the compromise was accepted-the detriment to an individual being outweighed by benefit to the whole. "[T]he legislative branch of government has the prerogative of declaring public policy and [] the mere wisdom of its choice in that respect is not subject to the judgment of the court."

McGuffey, 534 S.W.2d at 779. The Plaintiffs' constitutional challenge must fail.

4. Union Carbide's Liability to the Class II Plaintiffs

Union Carbide operated the PGDP from the facility's inception in 1952 until 1984. Class II consists of employees who began working at the plant after 1984; thus, none of the Class II Plaintiffs were ever employed by Union Carbide. These plaintiffs assert claims against Union Carbide only, outside of any direct employment relationship. Union Carbide contends that these claims are nevertheless barred by the exclusive remedy provisions of the KWCA. This Defendant believes that the Act "extends the employers' immunity from suit to parties like Union Carbide, which operated the facility pursuant to a contract with the same contracting party-the United States government-as the class members' employers." Def. Emp.'s Mem., p. 25.

In support of this contention, Union Carbide primarily relies on Building and Construction Trades Department v. Rockwell, 756 F.Supp. 492 (D. Colo. 1991), aff'd 7 F.3d

1487 (10th Cir. 1993),[17] with supporting reliance on Fireman's Fund Insurance Co. v. Sherman & Fletcher, 705 S.W.2d 459 (Ky. 1986). Union Carbide's position is assailable on at least two grounds. First, this Defendant has failed to demonstrate that the United States qualifies as a "contractor" under the KWCA and Fireman's Fund. And even assuming that it had made that showing, this Defendant has cited no authority that Kentucky law extends a contractor's immunity from tort liability to a *former* subcontractor for injuries to an employee of a current subcontractor.

Both Rockwell and Fireman's Fund address the ability of an injured subcontractor's employee to bring an action at law against the contractor, as opposed to the subcontractor (his actual "employer"). The general prohibition against such claims is commonly referred to as the "up-the-ladder" defense. See, e.g., Maricle 5 S.W.3d at 133; Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 379 (Ky. 1992).

Fireman's Fund involved three parties relevant here: Sherman & Fletcher, owners and developers of a residential construction project who contracted with others for most of the construction work; Elder, a framing subcontractor engaged to do the rough flaming carpentry on the project; and George, an employee of Elder who was killed in an accident while working on the project. George's estate sought to bring a wrongful death action against Sherman & Fletcher, claiming that it was a third party, not subject to the KWCA, whose

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[17] Hereinafter referred to as "Rockwell I" (district court opinion) and "Rockwell II" (circuit court opinion), or collectively as simply "Rockwell."

negligence caused George's death. Fireman's Fund, 705 S.W.2d at 460. Sherman & Fletcher, at the top of the ladder, would be entitled to the KWCA's immunity from an action at law for damages by the injured employee of Elder if it were deemed to be a "contractor." Id. at 461 (the Act "make[s] it plain that if Sherman & Fletcher is a contractor, it has no liability in tort to an injured employee of a subcontractor").

Under the KWCA, covered "employers" are liable for compensation for their employees' workplace injuries. K.R.S. 342.610(1). When an entity subcontracts, that contracting entity is treated as an "employer" and must pay workers' compensation benefits to an injured employee of the subcontractor if the subcontractor has not secured compensation for the employee. K.R.S. 342.610(2).[18] The purpose of this provision "is to prevent subcontracting to irresponsible people." Fireman's Fund, 705 S.W.2d at 461. Because the contractor must compensate the injured subcontractor's employee in the event that the subcontractor does not, it is also afforded the Act's immunity from tort actions brought by that subcontractor's employee. In short, because the potential for liability for payment of workers' compensation benefits extends up the ladder to the contractor, the immunity from actions at law does as well. See id. at 462.

However, the protections of the KWCA's exclusive remedy provision apply only if the entity meets the Act's

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[18] The KWCA provides that "[a] contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter ...." K.R.S. 342.610(2).

definition of "contractor."[19] K.R.S. 342.690(1); Fireman's Fund, 705 S.W.2d at 461. Merely because an entity is the "owner" of property who contracts with another to perform work on that property does not mean the entity is a "contractor" for the purposes of the KWCA. See United Engineers & Constructors, Inc. v. Branham, 550 S.W.2d 540, 543 (Ky. 1977). Under the Act, an entity is deemed a "contractor" if it

> contracts with another... [t]o have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of [the entity] ....

K.R.S. 342.6 10(2)(b).

Union Carbide states-without analysis, supporting evidence, or authority- that "the United States is a 'contractor' with respect to the Paducah facility (because it contracts with others to perform work at the facility that is a regular and recurrent part of its governmental activities)[.]" Emp. Defs.' Mem., p. 26. The Court is not persuaded. The plaintiff in Fireman's Fund urged an overly narrow construction of what constituted a "regular or recurrent part of the work of" the

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[19] The KWCA exclusive remedy provision states in pertinent part that "[f]or purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of K.R.S. 342.610, whether or not the subcontractor has in fact, secured the payment of compensation." K.R.S. 342.690(1).

contacting party's trade or business;[20] here, Union Carbide urges one that is likely overly broad.

Union Carbide "must demonstrate to the satisfaction of the trier of fact that" the operation of a uranium enrichment facility is: (1) a kind of work which is a regular or recurrent part of the work of (2) the trade, business, occupation, or profession of the federal government. Gordon v. NKC Hospitals, Inc., 887 S.W.2d 360, 363 (Ky. 1994); Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992). There is no evidence in that regard. Union Carbide has made no attempt to identify what it believes the United States' "trade, business, occupation, or profession" is for these purposes. In the absence of that showing, it obviously can not demonstrate that the operation of a uranium enrichment facility is a regular or recurrent part of the work of that trade, business, occupation, or profession.

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[20] Sherman & Fletcher's trade was "building construction," and Elder subcontracted to perform "rough framing carpentry." Fireman's Fund, 705 S.W.2d at 461. The plaintiff contended that Sherman & Fletcher was not a "contractor," and thus not immune from tort liability, because rough framing carpentry was not a regular or recurring part of the trade of building construction inasmuch as Sherman & Fletcher usually subcontracted that job to others.

The Court disagreed, finding that "[i]t cannot be disputed that rough framing carpentry is work of a kind which is a regular or recurrent part of the work of the occupation or trade of building construction[.]" Id. Thus the analysis must focus on whether the job is a regular or recurrent part of the work of the contracting party's "trade, business, occupation, or profession." Whether it is a regular or recurrent part of the work of the particular contracting party is immaterial.

In addition to having failed to demonstrate that the United States qualifies as a "contractor" under the KWCA, Union Carbide cites no authority for its contention that *Kentucky law* extends a subcontractor's immunity from suit to a former subcontractor, who has had no contemporaneous relationship, employment or otherwise, with an injured employee of a current subcontractor. Instead, Union Carbide relies on a case involving provisions in the Colorado Workers' Compensation Act-now repealed-as well as policy considerations under Colorado law.

Rockwell I, 756 F.Supp. 492, involved a Colorado federal district court interpreting the Colorado Workmen's Compensation Act ("Colorado Act"), prior to its amendment in 1990.[21] The district court found that the Colorado Act, like the Kentucky Act, provides an "up the ladder" defense immunizing a contracting party from tort liability. The court, indirectly citing policy considerations under Colorado law, also found that the immunity at the top of the ladder extends to the contracting party's *former* subcontractors. In Rockwell *II*, 7 F.3d 1487, the Tenth Circuit affirmed.

Although Rockwell is factually quite similar to this case, legally it is readily distinguishable. The language of the Colorado Act differs from that of the KWCA. Although each takes a somewhat different approach, both acts shield the party at the top of the ladder from tort liability when certain

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[21] The Colorado Workers' Compensation Act had been amended, after the plaintiffs' injuries but before either Rockwell decision was published. Both Rockwell opinions applied the pre-amendment statute. Rockwell I, 756 F.Supp at 493, Rockwell II, 7 F.3d at 1493 n.5. The statutes addressed in *Rockwell* have since been repealed.

conditions are met.[22] If those conditions are met, both acts extend that immunity to other parties, *cf.* Colo.Rev.Stat. § 8-48-101; K.R.S. 342.690(1). However, the Colorado Act defines "contractor," the threshold condition which must be met, much more broadly than does the KWCA.

Under the then-existing Colorado law, there was no requirement, as in Kentucky, that the work contracted for be a "regular or recurrent part of the work of" the contracting party's trade or business. Rather, under the provision of the Colorado Act applied in Rockwell, a contractor was merely

> Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor ...."

Colo.Rev.Stat. § 8-487101(1) (repealed). The Colorado Act stated that any entity meeting that definition "shall be construed to be an employer." Id. The federal government under Colorado law clearly met this broad definition, "[b]ecause the United States contracts out work to the plant's

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[22] The comparison of the Colorado Act and the Kentucky Act is complicated by the fact that each uses different terms to identify the parties. Proceeding "down the ladder," Kentucky generally uses the terms "contractor," to "subcontractor," to "subcontractor's employee." The Colorado Act and the Rockwell courts, on the other hand, proceed down the ladder with "contracting party," to "contractor," to "contractor's employee." For clarity, the Court uses the Kentucky terms whenever possible; it uses the term "contracting party" under the KWCA to identify the party at the top of the ladder, regardless of whether that party has met the Kentucky Act's definition of "contractor."

operator[.]" Rockwell I, 756 F.Supp. at 497. Thus, while under Colorado law the United States may have been properly considered a "contractor," that showing has not been made here. Absent that showing, any analysis of Rockwell's further findings is unnecessary.

However, the Court notes here that the Rockwell courts, albeit only summarily, relied on the broad policy considerations of the Colorado Act in extending its tort immunity to former subcontractors.[23] If Union Carbide later demonstrates that the United States was in fact a "contractor" for the purposes of the KWCA, it will also be required to demonstrate why Union Carbide, as a former subcontractor, is entitled to share its tort immunity. For example, if former subcontractors are not covered by the express language of the KWCA, what Kentucky policy would be furthered by

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[23] Rockwell found that not only did a contractor's immunity from suit extend to its subcontractors, but that it also extended to *former* subcontractors. See Rockwell I, 756 F.Supp. at 497; Rockwell II, 7 F.3d at 1495. The district court stated only that "[a]s long as the alleged injury arises out of work contracted for," the Colorado Act would bar a tort action. Rockwell I, 756 F.Supp. at 497. The Tenth Circuit affirmed, adding little more than to say that the trial court's "interpretation is consistent with the legislature's clear intent . . . both to insure that a [sub]contractor's employees are covered by the worker's compensation system and to provide only one employee remedy under that system[.]" Rockwell II, 7 F.3d at 1495.

This Court notes that Colorado has absolutely no intent-based tort exception to its workers' compensation act's exclusive remedy provision. See id. Even employers who specifically and deliberately intend to injure their workers are liable only under the workers' compensation system. Thus it may be reasonable that the Rockwell courts would guard the Colorado policy of steadfastly providing only one remedy to injured workers.

allowing them to avoid tort liability when they no longer have any relationship whatsoever with any of the parties?

As set forth above, Union Carbide has not met its burden of demonstrating that the federal government qualifies as a "contractor" under the KWCA. Therefore, the Court need not determine whether Kentucky law extends a contractor's tort immunity to its former subcontractors. "[E]very presumption should be on the side of preserving common law rights in the absence of compelling statutory language or social policy justification." Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 660 (6th Cir. 1979) (internal quotations omitted). Union Carbide's motion for summary judgment deeming the Class II Plaintiffs' claims barred by the exclusive remedy provisions of the Kentucky Workers' Compensation Act must be denied.

B. Whether the Plaintiffs' Claims are Time Barred

The Employer-Defendants and Defendant General Electric also argue that the Plaintiffs' claims are barred by the applicable statutes of limitations.[24] The Defendants contend that:

> [T]he evidence is undisputed that all plaintiffs knew or should have known, more than one year but in any event more than five years before this action was

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[24] Inasmuch as the statute of limitations defenses asserted by both the Employer-Defendants and Defendant General Electric are for the most part factually and legally indistinguishable, in this section those parties will collectively be referred to as "the Defendants." Further, the Court generally will only cite to one of their briefs unless each brief states fact or law which differs from the other's in some material way.

> originally filed on September 3; 1999, that their work at PGDP involved potential exposure to radiation not only from uranium but also from plutonium, neptunium, other transurauic substances, and technetium.

Emp. Defs.' Mem., p. 6 (emphasis removed); *see also, e.g.*, G.E.'s Mem., pp. 12-13 ("The deposition testimony of the four representative plaintiff-employees... as well as extensive documentary evidence, demonstrates that they understood, several years before suit was filed, that there were potentially hazardous uranium contaminants at the plant.").

There is little dispute over the law to be applied in determining when the Plaintiffs causes of action accrued.[25] The Court must apply the rule set forth in Louisville Trust Co v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979). Generally, a tort cause of action accrues at the time the injury is inflicted. See id. at 500. However, both the United States and Kentucky Supreme Courts recognize that certain injuries do not manifest themselves immediately.[26] Id. (citing

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[25] The Employer-Defendants' initial brief states that the discovery rule set forth in Louisville Trust and Perkins and applied in Blanton v. Cooper Industries, Inc., 99 F.Supp.2d 797 (E.D.Ky. 2000), governs when the Plaintiffs' causes of action against them accrued. Emp. Defs.' Mem., p. 32. Their response brief, however, argues strenuously that the discovery rule does not apply. Emp. Defs.' Reply, p, 13. The first contention was the correct one.

[26] The distinction here is between injuries that do not manifest themselves immediately, and those that do but later increase in severity. The discovery rule only applies to the former, and then only to "injuries of an inherently unknowable nature," Davis v. All

Urie v. Thompson, 337 U.S. 163 (1949)). In those cases, the general rule does not apply, and the plaintiff's cause of action is deemed to have accrued according to the application of the discovery rule. In Louisville Trust, the Kentucky Supreme Court adopted the discovery rule as follows:

> A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct.

Louisville Trust, 580 S.W.2d at 501 (quoting Raymond v. Eli Lilly & Co., 371 A.2d 170, 174 (N.H. 1977); see also Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 818 (Ky. 1991) (noting the importance of the "causal connection" prong). Thus there are two elements: (1) when the plaintiff knew or should have known that he was injured; and (2) when the plaintiff knew or should have known that his injury may have been caused by the defendant's conduct.[27] The statute of

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Care Medical, Inc., 986 S.W.2d 902, 906 (Ky. 1999), or "to injuries which cannot be discovered with reasonable diligence." Rigazio v. Archdiocese of Louisville, 853 S.W.2d 295, 297 (Ky. App. 1993). And even when the discovery rule does apply, the plaintiff's "lack of knowledge of the extent of his knowledge does not toll a statute of limitations[.]" Louisville Trust, 580 S.W.2d at 500.

[27] The discovery rule uses a reasonably prudent person test: the question is whether the Plaintiff knew, or in the exercise of reasonable care should have known, of the injury and its cause. See Davis v. All Care Medical, Inc., 986 S.W.2d 902, 906 (Ky. 1999); Gray v. Commonwealth of Kentucky, 973 S.W.2d 61, 62 (Ky.App. 1998).

limitations will begin to run only after both of these elements have been satisfied.

The Defendants focus entirely on the first element, to the total exclusion of the second. They repeatedly assert, expressly and impliedly, that the only time relevant here is when the Plaintiffs knew or should have known of the "potential exposure" to uranium, transuranics, and other uranium contaminants at the PGDP. *See, e.g.*, Emp. Defs.' Mem., pp. 6, 32-34; G.E.'s Reply, pp. 18-22.

The Defendants contend that the Plaintiffs knew or should have known of the extent and nature of the dangers at the plant from a variety of sources, including general workplace and job-specific training programs, information bulletins and employee newsletters, employee radiation monitoring, and public disclosures. They further contend that the Plaintiffs learned of the presence of transuranics-and the hazards associated with them-in no event later than 1992-93, when the "Transuranic Training Program" made its appearance.[28] The Plaintiffs, however, dispute the "knowledge" received at that time and the effectiveness of the safety precautions they were told would be implemented. The Plaintiffs claim that, rather than informing them, the program was used to deceive them into believing that they had no cause to be concerned. They state that

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[28] The "Transuranic Training Program" is the primary basis for the Defendants' claims that the Plaintiffs had knowledge of everything they now claim not to have known. The Employer-Defendants all but admit in their brief that the employees were not fully informed prior to that time; stating that the Transuranic Training Program was initiated "to assure that all workers were informed about transuranics." Emp. Defs.' Mem., p. 8 (emphasis in original).

> in the early 1990s defendant Lockheed affirmatively represented to workers that there were only "trace" amounts of transuranics present at the plant, but that even this small amount should he of no concern because a series of measures were being adopted at the plant to ensure worker safety. In fact, records show there were substantially more than "trace" amounts present at the plant, and defendants never implemented any of the measures set forth in their "Transuranic Training Program."

Pls.' Resp., p. 43.

The Plaintiffs and the Defendants each paint vastly different pictures of life as an employee at the PGDP. Ifthe Defendants' version of the story is true, then the information brought out in the *qui tam* action, the *Washington Post* exposé, and the United States Department of Energy's investigation, reports, and resulting apology to the PGDP employees revealed no new information to the Plaintiffs.

The Plaintiffs contend, and have adequately placed in dispute, that it was not until these revelations came to light in 1998-99 that they learned that the "potential" for exposure was something more than mere potential. It was then that they first learned that, in all likelihood, they had actually been exposed to extremely dangerous levels of radiation. The PGDP employees may have always known that they could potentially be injured, but not until the *qui tam* action and the subsequent revelations did that potential become a reality.

The parties also have differing interpretations of the appropriate statutes of limitations to apply to the Plaintiffs' outrage, fraud, and unjust enrichment claims. Those questions need not be addressed here. Regardless of whether all of the

claims are related to personal injuries and thus subject to the one year limitations period found in K.R.S. 413.140(1)(a), or whether some of the claims fall under a five-year statute of limitations, the Plaintiffs' position is that "[i]t was only in late 1998 that the *qui tam* discoveries revealed both the harm plaintiffs have suffered, and the causal relationship between that harm and the misconduct of defendants." Pls.' Resp., p. 37. Thus either the Plaintiffs' claims were "discovered" within one year of the filing of this lawsuit, or they were not. Those are matters for the factfinder at trial. Regardless ofwhether a one-year or five-year statute of limitations applies to a particular cause of action, the Plaintiffs have pointed to no event in the four years prior to the *qui tam* action that would save their claims under the discovery rule.

The Court does not see that this case will turn on whether the PGDP employees had ever heard of "transuranics," or knew the definition of the word, or could answer a True-False question regarding whether transuranics were "of concern" at the facility. Rather, the primary issue in this case is the extent of the parties' respective knowledge of the exposure. The focus of the inquiry under the discovery rule is knowledge: knowledge of the injuries and knowledge of the cause of those injuries. Those facts are very much in dispute here. The Plaintiffs have demonstrated genuine issues of material fact regarding their knowledge both of their injuries and of the Employer-Defendants' connection to those injuries. Summary judgment is not appropriate.

C. General Electric's Motion on Substantive Issues

General Electric's briefs in large part address the substantive issue of whether the Plaintiffs have brought viable claims under Kentucky law. Regardless of whether this argument has merit, it is clearly beyond the scope of the

matters currently before the Court per its order entered on December 30, 1999, notwithstanding that "GE gave plaintiffs notice of its intent to advance this argument more than a year ago." G.E.'s Reply, p. 2. The Court will not address these issues at this time. However, the Court agrees that it may be appropriate for the parties to seek the Magistrate's approval of an amended scheduling order to address these issues.

III. CONCLUSION and ORDERS

Accordingly, and for the reasons set forth herein, IT IS HEREBY ORDERED that:

1. The Employer-Defendants' motion [DN 65] for summary judgment dismissing the Class I Plaintiffs' claims as barred by the exclusive remedy provision of the Kentucky Workers' Compensation Act is GRANTED;

2. Union Carbide's motion [DN 65] for summary judgment dismissing the Class II Plaintiffs' claims as barred by the exclusive remedy provision of the Kentucky Workers' Compensation Act is DENIED;

3. The Defendants' motions [DNs 65, 66] for summary judgment dismissing the Plaintiffs' claims as barred by statutes of limitations is DENIED; and

4. General Electric's motion [DN 66] for summary judgment dismissing the Plaintiffs' claims on substantive grounds is not properly before the Court at this time.

This the 30th day of March, 2001.

/s/_____
Joseph H. McKinley, Jr.
Judge, United States District Court

cc: counsel of record

Entered March 30, 2001

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No. 05-265

IN THE

Supreme Court of the United States

ALPHONSE RAINER ET AL.,

Petitioners,

v.

UNION CARBIDE CORPORATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT GENERAL ELECTRIC COMPANY

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QUESTIONS PRESENTED

1. Did the Sixth Circuit and the District Court correctly hold that petitioners could not assert tort claims under the Price-Anderson Act because their allegations of asymptomatic subcellular changes from radiation exposure did not constitute a "present physical injury" sufficient to give rise to a cause of action in tort under Kentucky law?

2. Did the Sixth Circuit correctly hold that the comprehensive remedial scheme set forth in the Price-Anderson Act for injury arising out of exposure to certain radioactive materials precludes petitioners from asserting a *Bivens* claim based on such exposure, or, in the alternative, did the District Court correctly hold that *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), precludes petitioners from asserting a *Bivens* claim against respondents because they are private corporations?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent General Electric Company states that it has no parent corporation and that no publicly held company holds more than 10% of its stock.

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Price-Anderson Act, 71 Stat. 576 ..... *passim*

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RULES:

Sup. Ct. R. 10 14-15

IN THE

Supreme Court of the United States

No. 05-265

ALPHONSE RAINER ET AL.,

Petitioners,

v.

UNION CARBIDE CORPORATION ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT GENERAL ELECTRIC COMPANY

Respondent General Electric Company ("GE") respectfully submits this Brief in Opposition to the Petition for Certiorari.

INTRODUCTION

This case presents no issues that merit review by this Court. Although petitioners' tort claims are governed by the Price-Anderson Act, 71 Stat. 576, all parties agree that under the plain language of the Act, Kentucky law provides the substantive rules of decision for those claims. Applying those rules, the Sixth Circuit and the District Court both held that under Kentucky law, petitioners had not shown that they suffered from a "present physical injury" as necessary to withstand summary judgment on their tort claims. Because these rulings involved the interpretation of state law, not federal law, review by this Court is unwarranted.

The only federal law question posed by the Petition relates to the dismissal of petitioners' claim for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). On this point, the Sixth Circuit held that the comprehensive remedy set forth in the Price-Anderson Act for claims arising out of "nuclear incidents" precluded any recovery under *Bivens*. That ruling does not conflict with any decision of this Court, and petitioners do not contend that it conflicts with any decision of any other federal court of appeals. In any case, recovery under *Bivens* is also barred by this Court's decision in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), which held that a *Bivens* claim may not be asserted against a private corporation such as GE. Accordingly, review by this Court of the dismissal of the *Bivens* claim is unwarranted.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are § 11 of the Atomic Energy Act of 1954, as amended by the Price-Anderson Act, 71 Stat. 576, and as subsequently amended, 42 U.S.C. § 2014, and § 170 of the Atomic Energy Act, as added by the Price-Anderson Act and as subsequently amended, 42 U.S.C. § 2210. The relevant portions of these statutes are set forth in the Appendix to this Brief.

COUNTERSTATEMENT OF THE CASE

Petitioners are former workers at a uranium enrichment plant in Paducah, Kentucky, which is owned by the United States Government, and members of their households. The workers allege that at the Paducah plant, they were exposed not only to uranium, but also to so-called "transuranic" elements—plutonium and neptunium—that are more radioactive than uranium. The household members claim that they too may have been exposed to transuranic elements through contact with the workers. Although none of the petitioners currently manifests any symptoms of disease, three of the

workers assert that their alleged radiation exposure has caused chromosomal changes in a small number of their cells, and they claim that these changes put them at an increased risk of developing cancer some time in the future.

Petitioners filed suit in the United States District Court for the Western District of Kentucky against the private contractors who operated the Paducah plant for the United States Government (the "Paducah contractors").[1] They also sued GE, which operated a different Government facility—the Hanford plant in southeastern Washington State.[2] The Hanford plant transferred uranium to the Paducah plant, and petitioners alleged that this uranium feed was contaminated with plutonium and neptunium. Petitioners' complaints asserted claims for negligence, strict liability, and various intentional torts. Although pled under state law, it is undisputed that all of these claims are governed by the Price-Anderson Act, which gives the federal courts jurisdiction over actions arising out of or resulting from "nuclear incidents." [3] 42 U.S.C. § 2210(n)(2). In addi-

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[1] The Paducah contractors are Respondents Union Carbide Corporation, Martin Marietta Corporation, Martin Marietta Energy Systems, Inc., Martin Marietta Utility Services, Inc., Lockheed Martin Corporation, Lockheed Martin Energy Systems, Inc., and Lockheed Martin Utility Services, Inc.

[2] Petitioners incorrectly describe the Hanford plant (at 2) as GE's facility. In fact, the Hanford plant, like the Paducah plant, was owned by the United States Government. GE operated the plant for a fixed fee under a contract with the United States. The uranium that was sent from Hanford to Paducah was owned by the United States and transferred on Government instructions.

[3] A "nuclear incident" is defined as "any occurrence . . . within the United States causing . . . bodily injury, sickness, disease, or death . . . arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). Under the statute, uranium is a "source material," plutonium is a "special nuclear material," and neptunium is a "byproduct material." *See* 42 U.S.C. § 2014(e), (z), (aa); App. 43a.

tion to these Price-Anderson claims, petitioners also asserted a *Bivens* claim for damages based on alleged constitutional violations.

The District Court dismissed all of petitioners' claims in a series of orders, App. 38a–123a, and the Sixth Circuit affirmed the judgment in its entirety, App. 5a–35a. Petitioners sought rehearing or rehearing en banc, but both requests were denied, with no judge requesting a vote on the suggestion for rehearing en banc. App. 1a–2a.

We first discuss the basis for the rulings below with respect to the Price-Anderson claims and then separately discuss the *Bivens* claim.

A. The Price-Anderson Claims

As noted above, the Price-Anderson Act gives federal courts jurisdiction over actions arising out of "nuclear incidents." 42 U.S.C. § 2210(n)(2). The Act nevertheless provides that "the substantive rules for decision in such action[s] shall be derived from the law of the state in which the nuclear incident involved occurs unless such law is inconsistent with the provisions of [42 U.S.C. § 2210]." *Id.* § 2014(hh). In this case, the state where the alleged nuclear incident occurred is Kentucky, and all parties agree that Kentucky law is applicable.

Respondents (GE and the Paducah contractors) moved for summary judgment on petitioners negligence and strict liability claims based on Kentucky law, as set forth by the Kentucky Supreme Court in *Wood* v. *Wyeth-Ayerst Laboratories*, 82 S.W.3d 849 (Ky. 2002), and *Capital Holding Corp.* v. *Bailey*, 873 S.W.2d 187 (Ky. 1994). Those cases held that under Kentucky law, a plaintiff may not recover damages under a negligence or strict liability theory without proof of a "present physical injury." Respondents' argued that petitioners' showing of chromosomal damage, which was unaccompanied by any symptoms or manifestations of disease, was insufficient to meet this standard.

Respondents also sought summary judgment on *all* of the Price-Anderson claims (including both the negligence and strict liability claims and the intentional tort claims) based on *In re Berg Litigation*, 293 F.3d 1127 (9th Cir. 2002). In that case, the Ninth Circuit held that under the Price-Anderson Act, a plaintiff may not recover damages absent proof of a "physical injury," even if the applicable state law would permit such recovery. Respondents argued that petitioners' showing of chromosomal damage did not suffice to establish a legally cognizable injury under the Price-Anderson Act, as construed by the Ninth Circuit in *Berg*.

The District Court granted summary judgment. Relying on *Nieman* v. *NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997), the court first held that petitioners could bring their tort claims only under the Price-Anderson Act, but that Kentucky law would provide the substantive rules for deciding those claims. App. 43a. Next, the court held that respondents were entitled to summary judgment on the negligence and strict liability claims under Kentucky law, because petitioners had not made a sufficient showing of a "present physical injury" to withstand summary judgment under *Wood* and *Capital Holding*. App. 44a–51a.[4] Finally, the court held that respondents were also entitled to summary judgment on the intentional tort claims under *Berg* and the Price-Anderson Act because petitioners had not made any showing that they had suffered any physical harm. App. 51a–53a.

On appeal, petitioners argued that their claims would be viable under Kentucky law. They did not argue that the District Court had erred in its construction of the Price-Anderson Act; to the contrary, petitioners conceded in their reply brief that the Price-Anderson Act imposed a "bodily injury or disease" requirement that

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[4] The Petition incorrectly states (at 9) that the District Court relied solely upon an unpublished federal district court case from Massachusetts.